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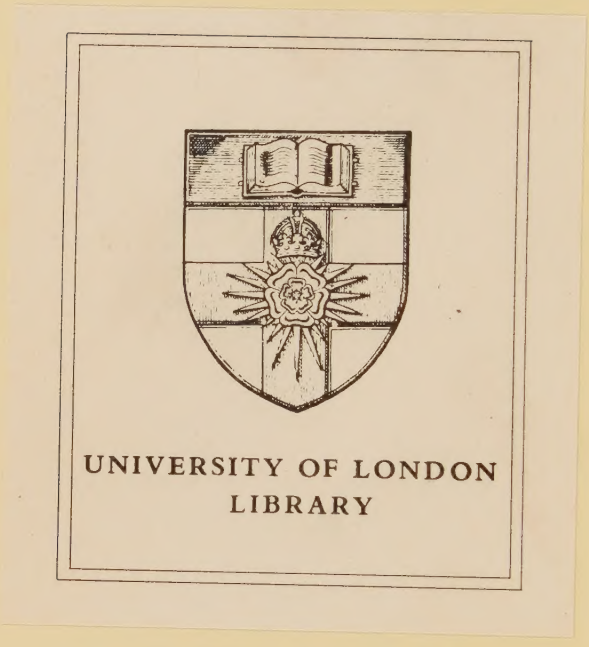

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# THE IRISH REPORTS.

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

## 1919.

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On 11th July, 1919, Denis Stanislaus Henry K.C. was appointed His Majesty's Attorney-General for Ireland; and Daniel Martin Wilson was appointed His Majesty's Solicitor-General for Ireland.

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# CASES

DETERMINED BY

## THE CHANCERY DIVISION

OF

## THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

## THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

## THE COURT OF APPEAL.

---

# 1919.

---

## HARPUR *v.* BUCHANAN.

*M. R.*
1918.

July 22.
Nov. 26.

*Statute of Limitations — Realty — Mortgage — Mortgagee's suit for benefit of all incumbrancers—Claim by puisne incumbrancer—No payment of principal or interest to claimant for more than twelve years before claim—Action commenced within twelve years of claimant's mortgage—Right of claimant to payment—R. S. C., Or.* 33, *r.* 7.

A mortgagee's suit enures for the benefit of all incumbrancers on the lands. A mortgagee, whose claim is not statute-barred at the date of the commencement of the action by the plaintiff, is entitled, on bringing in his claim, to be paid his principal with six years' arrears of interest accrued prior to the commencement of the action. *Sterndale* v. *Hankinson* (1 Sim. 393) applied: *Bennett* v. *Bernard* (12 Ir. Eq. Rep. 229) followed. The distinction, in this respect, between the effect of bringing an action for foreclosure and an action for the sale of the mortgaged lands observed upon.

FURTHER CONSIDERATION.

The action was brought by the plaintiff as mortgagee for a declaration that the amount due on foot of his mortgage was well charged on the defendant's lands comprised therein, and for a sale of the said lands in default of payment of the amount found

M. R. 1918.

HARPUR v. BUCHANAN.

to be due to him. On the 18th July, 1910, judgment was given declaring the plaintiff's mortgage well charged on the lands, which were ordered to be sold in default of payment, and an inquiry was directed as to the charges and incumbrances affecting the lands subsequent as well as prior to or contemporaneous with the plaintiff's demand. William B. Buchanan brought in a claim on foot of a mortgage by the defendant for £100 with interest at 5 per cent., dated 20th May, 1902. No payment for either principal or interest on foot of this mortgage had ever been made. The present action was commenced, and judgment given within twelve years from the time that the mortgage debt accrued due, but more than twelve years had elapsed before the claim was brought in. The chief clerk disallowed the claim, and the claimant applied to vary his certificate.

*E. J. Kelly*, for the claimant.
*Wylie K.C.*, for the plaintiff.

*Cur. adv. vult.*

Nov. 22.

O'CONNOR M.R.:—

This is a mortgagee's action brought for the purpose of realizing the plaintiff's mortgage debt by a sale of the defendant's lands.

On the 18th July, 1910, the usual judgment was given whereby the mortgage was declared well charged upon the lands, and they were ordered to be sold. The order further directed an inquiry to be made what charges and incumbrances affected the lands subsequent as well as prior to or contemporaneous with the plaintiff's demand. Pending the inquiry, a claim was brought into chambers on behalf of William B. Buchanan on foot of an indenture of mortgage, dated 20th May, 1902, whereby the defendant mortgaged the lands to the claimant to secure the principal sum of £100 with interest at the rate of £5 per cent. per annum. No interest was ever paid on foot of the mortgage, and the claim was for the full principal with interest from the date of the mortgage. When the claim was brought in more than twelve years had elapsed since the mortgage debt had become payable, and it was disallowed. The chief clerk's certificate was subsequently made up, and

it finds the incumbrances affecting the lands, but makes no mention of the claimant's mortgage. The claimant now applies to the Court to vary the certificate on the ground that this action was commenced and judgment was given within twelve years from the time the mortgage debt accrued, and that the claimant is entitled to the benefit of the action and the judgment, even though his claim was not brought in within the period of twelve years. He claims to be entitled to treat the action as one brought for his benefit, as well as for the benefit of the plaintiff, and that he stands in the same position as if he were the plaintiff in the action.

It is quite clear that a mortgagee's suit for a sale provides for the payment, not merely of the plaintiff's debt, but all other incumbrances on the land. This sufficiently appears from the form of the inquiry for incumbrances which is prescribed by the rules. I see then no reason for excluding an incumbrancer from the principle of *Sterndale* v. *Hankinson* (1), which is, that a creditor's administration suit is one on behalf of all creditors, and that each creditor is entitled to the benefit of it just as if he instituted the suit himself. This may not now be the law in England, but it has always been followed in Ireland.

A mortgagee's suit is also a suit on behalf of all the incumbrancers in the sense that all the incumbrancers must be ascertained and paid out of the proceeds of sale so far as they go. This was recognized as far back as *Bennett* v. *Bernard* (2). There a claim was brought in by a judgment creditor, who claimed the benefit of the suit in order to protect himself against the Statute of Limitations. It was held that he could not do so, because at the time the action was instituted he was not, as the law then stood in 1811, an incumbrancer, and could not have instituted the suit, and therefore could not have regarded it as his suit. The right, however, of an incumbrancer in the same class as the plaintiff was recognized. In *Archdall* v. *Anderson* (3), which was a mortgagee's suit, the Vice-Chancellor said, having referred to the general order (102) of 1843 (4), which is the same as the existing rule of Court (Or. 33, r. 7), that he was of opinion that the action

(1) 1 Sim. 393.
(2) 12 Ir. Eq. Rep. 229.
(3) 25 L. R. Ir. 433.
(4) See Darley Chancery Orders, p. 101.

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enured for the benefit of all incumbrancers coming in and obtaining payment under the proceeding, just as in cases of a creditor suing on behalf of himself and all other creditors. He held that the claimants, who were legatees with charges on the lands, were entitled to interest for six years prior to the commencement of the action.

There is good reason for the observance of such a general rule, because if a creditor or incumbrancer could not rely upon a creditor's or mortgagee's suit as in some respect protecting him, every creditor and every incumbrancer would be obliged to institute a suit on his own account.

It is not every mortgagee's suit of which another mortgagee is entitled to the benefit. This is well illustrated by the following passage from Darby and Bosanquet's Statute of Limitations, p. 566:—"The action, by whomsoever commenced, must, to come within the reasoning of the cases, be in its nature one for the recovery of the demand sought to be saved from the bar of the statute, and, therefore, if in a foreclosure action an inquiry is directed as to incumbrances, no incumbrancer coming in under the decree can get any benefit from the commencement of the action, so far as the Statute of Limitations is concerned."

A foreclosure action, which is common in England but unknown in Ireland, is in no sense an action for the benefit of any person other than the plaintiff. It is rather an action for the exclusive benefit of the plaintiff against all others having an interest in the lands. It is entirely different in character from the action, which is common in Ireland, for a sale of lands and a distribution of the proceeds of sale among all the incumbrancers who have claims upon them. In such an action each incumbrancer is entitled to regard it as an action brought in his interest as well as in the interest of the plaintiff.

For these reasons, I allow the claim for the principal sum, with six years' arrears of interest prior to the commencement of the action, costs with demand.

Solicitors for the plaintiff: *Elliott and Clark.*

Solicitor for William B. Buchanan: *T. Elliott.*

A. H. W.

## WARD *v.* DUBLIN NORTH CITY MILLING CO., LTD.

*M. R.*
1918.
July 11, 12, 23.

*Company—Forfeiture of unclaimed dividends—Notice of declaration of dividends—Posting to registered address—Death of joint shareholder—Actual notice of death—Actual notice of address of surviving shareholder.*

A limited company by its articles provided that "Notice of each dividend that shall be declared shall be given to each member in manner hereinafter mentioned, and all dividends unclaimed for three years after having been declared may by a resolution of the directors be forfeited for the benefit of the company."

Notices with respect to shares to which persons were jointly entitled were to be given to the person named first on the register of members; and a notice was to be served either personally or by post, "addressed to such member at his registered or last known place of abode."

In 1892 K. and M. were registered as joint owners of 115 shares in the company, K.'s address being noted as North Earl Street, Dublin, and M.'s as Usher's Quay, Dublin; but there was a special note, dated 1889, that M.'s then address was 13 Oxford Street, Sydney, N.S.W. K. died in 1899, and though the fact of his death was never officially notified to the company, it was, in fact, well known to its officials. Notices of meetings of the company at which dividends would be declared continued to be sent out to K., whose name appeared first on the register of members, and were returned by the Post Office marked "gone away," and in one instance "deceased." M. died in 1908, and on a claim for past dividends being made by his executrix, the company relied on resolutions forfeiting the unclaimed dividends for the years 1908, 1909, 1910, 1911, 1912, and 1913.

*Held*, that a resolution forfeiting an unclaimed dividend must be strictissimi juris; that the provisions of the Articles of Association regarding the service of notices on the shareholders must not be used dishonestly or unfairly; and that if the officers of a company have actual knowledge that one of two joint shareholders is dead, the company cannot rely upon a formal notice addressed to the deceased shareholder for the purpose of basing upon it a resolution forfeiting an unclaimed dividend. *New Zealand Gold Extraction Co.* v. *Peacock* ([1894] 1 Q. B. 622), *Allen* v. *Gold Reefs of West Africa, Ltd.* ([1900] 1 Ch. 656), distinguished: *James* v. *Bueno Venturo Nitrate Grounds Syndicate* ([1896] 1 Ch. 456) applied.

ACTION.

The facts appear sufficiently from the judgment of the Master of the Rolls.

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*S. L. Brown K.C., H. Wilson K.C.* (with them *E. J. Kelly*), for the plaintiff.

*Blood K.C., FitzGibbon K.C.* (with them *Davitt*), for the defendant company.

*Cur. adv. vult.*

July 23.

O'CONNOR M.R.:—

The amount at stake in this action is not very large, but the legal principles which are involved are important. The question at issue is whether the defendant company was, in the circumstances which I shall presently mention, entitled to forfeit certain dividends which became payable to a shareholder.

In the year 1884 James M. Macken was the registered holder of 115 shares in the company. He died on the 2nd October, 1884, and probate of his will was granted to Patrick Kenny and James J. Macken on the 31st October, 1884. The grant of probate was exhibited at the office of the company on the 14th September, 1891, and on that occasion a note was taken of the names and addresses of the two executors, viz., Patrick Kenny, North Earl Street, Dublin, and James J. Macken, of Usher's Quay. The addresses given were evidently taken from the grant of probate, but a special note was taken that James J. Macken's then address was 13 Oxford Street, Sydney, N.S.W. I have seen this entry in the books, and I am satisfied from it that it was made as an official act, and for the purpose of completing the registration of the shares in the joint names of the two executors. It was suggested that on that occasion the probate was merely exhibited for the purpose of having a note taken that the shareholder had died, and that probate had been granted to the two executors, but without any intention that they should be registered as shareholders. But there was no reason for any such caution on the part of the executors, because the shares were fully paid up, and carried no liability. There was another reason for not completing the registration at the time. The company was not then in a very flourishing condition. No dividends had been paid for years, a considerable portion of its capital had been lost, and, shortly prior to the exhibition of the probate, the shareholders had passed a special resolution for the

reduction of the capital, by which the shares had been reduced from £10 to £5. This reduction of capital was confirmed by order of the Court on the 12th June, 1892. The process of reduction would not in the course of proceedings be completed for some little time. This would necessitate the calling in of old certificates and the issue of new certificates, and a consequent rectification of the entire share-register, which would involve time. This explains why, when the probate was exhibited, the shares were not immediately registered in the executors' names.

The next piece of evidence we have is given by the register itself, and that is the registration on the 18th and 28th April, 1892, shortly after the reduction of capital had been completed, of Patrick Kenny and James J. Macken as joint owners of 115 shares. Their addresses are given as in the probate—in the case of Patrick Kenny as of North Earl Street, and in the case of James J. Macken as of Usher's Quay. There is no mention of the change of address of the latter to Oxford Street, Sydney, which had been officially noted. This must have been owing to the negligence of the secretary, or some clerk acting under him.

Patrick Kenny (whose name was the first registered) died on the 10th April, 1899, leaving James J. Macken, then resident in Sydney, the surviving joint owner, and, as between him and the company, the sole owner of the shares.

Now, it was certainly the duty of the surviving shareholder to notify the death of the deceased joint holder to the company; but he was in Sydney, and would not know of the death for at least some time. The company was not bound to know of the death of any shareholder, but it was admitted that Patrick Kenny's death was in fact well known to the company's officials. As Mr. Rourke, the chairman of the company, said, "Everyone knew Mr. Kenny, and we all knew he died," or something tantamount to that.

But, notwithstanding his death, and notice that he had died, the secretary of the company continued to send out notices of meetings of the company to Patrick Kenny, of North Earl Street. These notices always came back to the company in the envelopes, with the P.O. note thereon, "Gone away," and in one instance, "Deceased." Disregarding these returned dead letters the notices

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were continued, a course of conduct to be attributed only to gross negligence, having regard to the actual notice of the gentleman's death. In the case of a sole shareholder who has died, and whose death is known to the company, the sending of notices to his late address may be the best way of reaching his personal representative, but there is no reason for addressing notices to a deceased joint shareholder, because the whole interest in the shares enures to the survivor who becomes the sole owner.

The only proper course for the company, having had actual notice of Mr. Kenny's death, and having had the notices returned through the dead-letter office, was to send them to the surviving joint holder at the address which had been noted in the company's books. If that had been done the notices would have probably reached the survivor, and the duty towards him have been discharged.

The survivor lived till the 4th September, 1908, and the company does not appear to have had any notice of his death.

The conscious default of the company to do what was only right and fair in the present case is brought home to them in this way: dividends were declared in the years 1909, 1910, and 1911 in respect of the years 1908, 1909, and 1910, and the form was gone through of making out dividend warrants for these years, payable to P. Kenny, but, although made out, they were retained in the company's office. What was the meaning of not sending them out? The only explanation is that the company knew that P. Kenny was dead. What was the meaning of making them out in his name? I can find no other explanation than gross negligence. It was for the company to offer some explanation, but none was proffered. And here I must comment on a feature of the case as conducted in Court. The secretary of the company, whose name appeared on the dividend warrants, was actually in Court during the first day of the trial. He could have explained why the dividend warrants were made payable to P. Kenny. He was not produced as a witness. On the second day the secretary was not in Court, and every opportunity was given to the company to produce him, but he was non est inventus. Counsel for the company made no excuse for his failure to be present. They conducted their case with the utmost candour and fairness. They

were simply obliged to leave the case as they found it; but I must draw my own conclusion from the failure to produce a material and easily procurable witness, and that is that the secretary found it impossible to excuse his conduct, and was glad to escape the ordeal of the witness-box.

James J. Macken, the surviving shareholder, died, as I have said, on the 4th September, 1908, in Australia. His will was proved in that country on the 22nd December, 1908, by the plaintiff and Mark Foy. The executors, although they knew that they had an interest in the company, did not apparently concern themselves about it, the explanation being that the shares were not an asset of any value, because for years they had paid no dividend, and they were not aware that dividends had been declared for 1908, 1909, and 1910. But a member of the Macken family happened to be in this country in 1911, and on behalf of the executors he called on the chairman of the company, Mr. Rourke, and made inquiry about the shares. There was a conversation, and Mr. Rourke gave the gentleman in question all information, discussed with him the financial position of the company, told him that dividends had been declared and were ready to be paid, but that they would be forfeited unless the parties legally entitled to the shares in question got their names placed as shareholders on the register of the company. Nothing could have been fairer or more proper than the way in which Mr. Rourke received and treated his visitor.

Mr. Rourke referred him for further information to the secretary of the company, and accordingly the following correspondence ensued:—

[James V. Macken to Thomas Lynch, Sec. D.N.C.M. Co., Ltd., Dated 30th June, 1911.]

DEAR SIR,

I have before me a report of the directors of your company at a general meeting held on the 7th March, 1911, at which a dividend of 5 per cent. was declared. I have 105 (one hundred and five) ten-pound shares in your company, numbered 5017 to 5116, inclusive, and 546 to 550, inclusive. These shares were originally the property of my father, the late J. J. Macken, of Sydney, Australia. They will probably be registered in his name or in that of his father, James M. Macken.

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I should be greatly obliged to you if you would inform me—

First. In whose name the shares are registered, so that I may take the necessary steps to effect a transfer?

Second. What dividends, if any, payable under these shares are lying unclaimed at your office?

I shall be over in Dublin at the end of this month, and would like very much to dispose of these shares if marketable.

Apologizing for this trespass on your time,

I remain, Sir,

At your service,

JAMES V. MACKEN.

30th June, 1911.

[Thomas Lynch to James V. Macken, dated 6th July, 1911.]

DEAR SIR,

I desire to inform you that there are in all 115 shares held in the joint names of Patrick Kenny, merchant, North Earl Street, and James J. Macken, Usher's Quay, Dublin, and there are dividends amounting in all to £74 15*s.* to the credit of these shares. Awaiting your call here, when any further information you require will be supplied,

Yours truly,

THOMAS LYNCH, *Secretary.*

There the correspondence for the time ended, and for some reason not given the matter was allowed to drop until the year 1917.

Dividends were declared by the company for the year 1908 on the 22nd February, 1909; for the year 1909 on the 8th March, 1910; for the year 1910 on the 7th March, 1911; for the year 1911 on the 13th February, 1912; for the year 1912 on the 28th February, 1913; and for the year 1913 on the 18th March, 1914. The sum-total of these dividends is £161. The action was brought for the recovery of this amount by the personal representative of the surviving shareholder; and the defence of the company is that all these dividends were forfeited under powers vested in the company by the Articles of Association.

Let us then see what these powers are, and how the company purported to exercise them. Art. 138 prescribed:—"Notice of each dividend that shall be declared shall be given to each member in manner hereinafter mentioned, and all dividends unclaimed for three years after having been declared may by a resolution of the directors be forfeited for the benefit of the company."

I read this article as meaning that the unclaimed dividends to be forfeited are dividends of which notice has been given, for I cannot read the earlier part of the article apart from the later.

Arts. 140 and 141 prescribe how notices are to be given. Art. 140 says:—"All notices directed to be given to the members shall, with respect to any shares to which persons are jointly entitled, be given to whichever of such persons is named first on the register of members"; and art. 141 says:—"A notice may be served by the company on any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered or last-known place of abode."

Now, provisions such as these in arts. 140 and 141 are absolutely necessary for the convenient despatch of business and a company's protection. But they should not be used dishonestly or unfairly, and if the officers of a company have actual knowledge that one of two joint shareholders is dead, and if with that knowledge present to their mind they issue notices to the deceased shareholder and no notice to the surviving registered shareholder, the company is in such default that it cannot rely upon a formal notice which in substance is no notice. That would be a perversion of the purpose for which the articles were framed.

Coming back to art. 138, the notice to be served is a notice of "each dividend that shall be declared," that is, there shall be a separate notice of each dividend when declared. Now, what are the facts? The evidence is that no such notice was served on either of the joint shareholders or at their addresses. The only notices (and these always came back through the dead-letter office) were those addressed to Mr. Kenny after his death, and these were notices of meetings at which dividends would be proposed. There were no notices of declaration of dividends. These are invariably to be found in the counterfoils of dividend warrants sent out after the meeting which declared the dividend; but although the warrants were made out in Mr. Kenny's name, they were not sent out, and for the sufficient reason that it was known that he was dead, and that his personal representatives had no claim to them. So far, then, there was no notice on which to base a forfeiture; but the company says that actual notice was given

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to the agent of the plaintiff on the 6th July, 1911, by the letter of that date which I have already read. No doubt that letter did give notice that there were other dividends unclaimed amounting to £74 15*s.*, but it gave no particulars of the dividends; it did not say how much for each year. This may seem to be a small point, but it must be remembered that the defendants are relying upon a forfeiture. The plaintiff is asserting a legal claim, not a mere equity. The company owed the money, and if the amount was forfeited the forfeiture must have been strictissimi juris. In my opinion art. 138 requires notice of the declaration of each dividend, and the obligation of serving such a notice is not to be satisfied by a notice that a bulk sum is due for dividends covering a number of years.

But further, even admitting that the letter of the 6th July, 1911, was a good notice, the forfeiture of the dividends declared on the 23rd February, 1909, was premature. The resolution forfeiting that dividend was passed less than three years after the notice, and if I am right in my interpretation the forfeiture should not be declared until three years had elapsed after notice of the declaration of the dividend. The same observation applies to the dividend for 1909, declared on the 8th March, 1910. The forfeiture was declared on the 13th January, 1914, less than three years after the letter of the 6th July, 1911. The dividend for 1910 was declared on the 7th March, 1911, and the forfeiture resolution (if it was such) was not passed till 15th December, 1914, so that the three years after notice had elapsed. This dividend does not therefore stand in the same position as the two previous dividends.

But I must make this general observation with regard to all the resolutions of forfeiture. We are dealing with legal rights which are not to be swept away by an inconsiderate stroke of the pen. The proprietorial right of each shareholder entitles him to and demands special consideration. A resolution of a general and sweeping character forfeiting all dividends unclaimed and which were for three years declared is, in my opinion, entirely irregular, because it ignores such special circumstances as might properly be taken into consideration when dealing with shareholders specially circumstanced.

The absence of notice of the declaration of dividends according to the ordinary course of the company's business, the withholding of dividend warrants in the company's office although the dividend warrants were completed, the notification recorded in the books of the company that the surviving shareholder's new address was Sydney, New South Wales, and the negligent omission to record it in the proper place, were all matters for consideration before any resolution was adopted to forfeit the dividends in question: and I am satisfied on the evidence that no thought was given to these matters, indeed that they were never brought before the directors when the forfeiting resolutions were passed. I am satisfied that these resolutions were only intended to cover ordinary cases of dividends unclaimed, the warrants for which were sent out in the usual course.

In dealing with this aspect of the case I must again refer to the unwillingness of the secretary to come forward as a witness. I would have liked to have heard him cross-examined as to how these resolutions were passed and what materials the directors had before them. I would have liked to have had from him some explanation of the indorsement on some of the dividend warrants of "James Macken, deceased," and "re Macken"—a most unusual indorsement—quite inconsistent with the ordinary course of a company's business.

So much for the dividends declared for the years 1908, 1909, and 1910. The remaining dividends which the company purported to forfeit were for 1911, 1912, and 1913. But it was not contended at the Bar that there was any notice of any kind given of the declaration of these dividends, and I must hold that there was no valid forfeiture of them.

I have not referred to any authorities. I do not think that there are any in point, and I have based my reasoning on general principles of law.

Some cases were cited, and I do not think that I would be treating the arguments of the learned counsel for the company with respect unless I dealt with them. *The New Zealand Gold Extraction Co., Ltd.* v. *Peacock* (1) was a case in which a company was authorized to make calls on its shares, giving fourteen days'

(1) [1894] 1 Q. B. 622.

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notice, and to serve the notice upon any member of the company either personally or through the post, by letter addressed to such member at his registered address, no provision being made as to service of notice on the representatives of a deceased member. After the death of a member, the company made a call upon his shares, and gave notice thereof through the post by a letter addressed to him which did not reach his executors (who did not know that he had been a member) and was returned to the company, marked "gone away." It was held that the call had been properly made, and that there had been sufficient notice of the call. But Lindley L.J. emphazises the fact that the company had no notice of the shareholder's death; and Davey L.J. says: "I do not think that if they had notice of the death of the member, they could rely on service upon him at his registered place of address, and nothing that we say in this case touches that question." That case, therefore, does not touch the present one. The next case cited was *James* v. *Bueno Venturo Nitrate Grounds Syndicate, Ltd.* (1). There the articles of association of the company provided for the issue of new shares to be offered to the members in proportion to their existing shares. It was held that the personal representatives of a deceased member whose name remained on the register of shareholders were entitled to an allotment on the ground that the deceased shareholder remained a member within the meaning of the articles. The offer of allotment was to remain open for ten days, but notice of the allotment had not been sent to the registered address of the deceased member. It was held that the personal representative had not lost the right to an allotment, but the question was discussed—What would be the right of the personal representative if a notice had been served at the registered address of the deceased member and it had not reached the personal representative? That question did not arise, because notice was not given; but Lord Herschell's observations are important; at page 465, he says:—"The notice conveying the offer was not sent to the registered address of the deceased member. Even if this would have been sufficient, had no better means of communication with his representative been known, I am not satisfied that it would have sufficed where, as in

(1) [1896] 1 Ch. 456.

this case, the company had prior to the date of the resolution of April, 1893 (that is, the resolution giving the right to allotment), been in communication with the solicitor of the executrix with reference to other matters relating to the shares of the deceased." Lord Herschell was therefore of opinion that a company is bound to have regard to actual notice of the death of a shareholder and is not entitled to shelter itself behind the absence of the technical notice that is involved in a change in the register of shareholders. *Allen* v. *Gold Reefs of West Africa, Ltd.* (1), was also referred to. There it was decided that notice of a meeting need not be sent to the registered address of a deceased member or to his personal representatives who had not become shareholders. But there were special reasons for the decision not applicable to the case we are dealing with, as shown by the following observations of Lindley M.R. :—"Notices of meetings have only to be given to members, and the executors were not members. If no notice at all had been sent to the executors or to Zuccani's (the deceased shareholder's) registered address, the omission would not, in my opinion, have affected the propriety of holding the meetings or the validity of the resolutions passed at them. Article 45 expressly provided that notices of meetings need not be sent to executors who had not become members. To hold that meetings of companies could not be properly held unless the notices convening them were given to the unregistered legal personal representatives of all deceased members would be contrary to the ordinary principles applicable to corporate bodies, and indeed to other associations as well."

The special considerations here dwelt on show that the case has no bearing on the present one.

In the result, I am of opinion that the plaintiff is entitled to recover all the dividends sued for. It remains to be considered how I should deal with the costs. The plaintiff has been guilty of very great delay, and that delay has caused the litigation. If I were dealing with a purely equitable claim, I would, perhaps, let the parties abide their own costs ; but the plaintiff's claim is a strictly legal claim such as could have been enforced in a Court of Common Law before the Judicature Act, and I think she has the

(1) [1900] 1 Ch. 656.

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same right to costs as she would have had if she had sued in the King's Bench Division.

Solicitors for the Plaintiff: *J. H. Walsh & Co.*
Solicitors for the Company *J. L Scallan & Co.*

A. H. W.

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*Appeal.* 1918. Nov. 26.

## IN THE MATTER OF THE ESTATE OF THE REV. CORNELIUS M'SWEENEY, DECEASED. ELLEN M'SWEENEY *v.* MARY LOUISA MURPHY (1).

*Practice Parties — Administration suit — Legal personal representative — English personal representative resident and sued in Ireland.*

The legal personal representative of a deceased intestate is a necessary party to a suit for the administration of his personal estate, and no decree can be made in such a suit in Ireland against a party who has obtained a grant of letters of administration in England, which has not been re-sealed in Ireland, even though such party is resident in Ireland.

APPEAL.

This was an originating summons instituted by the plaintiff, as a next-of-kin, claiming administration of the personal estate of the Rev. Cornelius M'Sweeney, the defendant being sued as his administratrix.

The plaintiff, in an affidavit filed in support of the summons, averred that the said Rev. Cornelius M'Sweeney died intestate on the 25th of February, 1916, leaving him surviving a number of next-of-kin, including the plaintiff, and one Maria Murphy; that his assets consisted of certain Stock Exchange securities of the value of £3,550, and a sum of £517 with the Manchester and Liverpool District Banking Co.; that the defendant as the lawful attorney of the said Maria Murphy, obtained from the principal registry of the Probate Divorce and Admiralty Division of the High Court of Justice, on the 29th March, 1916, a grant of letters of administration of the personal estate of the deceased;

(1) In the Court of Appeal, before MOLONY C.J., and RONAN and O'CONNOR L.JJ.

that the defendant had sold and realized the securities of the deceased, and had, notwithstanding several demands by the next-of-kin, neglected to distribute the assets amongst them.

The defendant filed an affidavit in which she denied that she had been guilty of any wilful delay in winding up the estate, and alleged that the apparent delay was caused by certain difficulties arising out of the assessment of estate duties and other matters.

The Master of the Rolls, on the 22nd April, 1918, refused to make an order for administration, on the ground that no proper legal personal representative was before the Court. Hence this appeal.

*Rearden*, for the appellant:—

An order for administration should have been made. I admit that it is necessary to have the legal personal representative before the Court, but that is the case here. It is immaterial that the grant is an English one. Equity acts in personam, and the defendant is both domiciled and resident in Ireland. If it is necessary to prove the existence of assets in this country, I say that it must be assumed that the defendant, who resides in Ireland, is in possession of the proceeds of the sale of the securities which she admits having realized. In *Ewing* v. *Orr Ewing* (1), Lord Selborne L.C. said: "With respect to domicile, it is familiar law that the succession to the movable estate of a deceased person is governed by the lex domicilii. But that law does not prescribe the forum in which the persons beneficially entitled to the succession may pursue, against the trustees in whom the estate is vested, their proper remedies. The proposition, that the Courts of that country only in which a testator dies domiciled can administer his personal estate, is without support from any authority," etc. This case establishes that although the particular character of a personal representative is local and territorial, his functions are not. Section 22 of the English Probate Act of 1857, corresponding with sect. 27 of the Irish Act, enables the English grant to be given in evidence in this country. The production of this grant establishes that the defendant is the legal personal representative of the deceased. Re-sealing of this grant would only be necessary

(1) 9 A. C. 34, at p. 39.

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if the defendant wished to collect assets, or deal with assets in this country; but such re-sealing is unnecessary for the purpose of enabling her to be sued. The defendant, who has assets in her possession, and withholds them from the next-of-kin, is in the position of a trustee, and can be sued where she is found.

*Burke*, for the respondent:—

This is not an action in which it is sought to follow trust funds into the hands of a trustee. It is an administration suit or nothing. That being so, it necessarily fails, because there is no legal personal representative before the Court: *Rowsell* v. *Morris* (1). The defendant is the legal personal representative of the deceased in England, but she cannot be recognized as such in Ireland, unless she obtains a grant in this country, or the English grant is re-sealed here. If sect. 22 of the Act of 1857 was sufficient to enable the plaintiff to sue, the re-sealing section would be unnecessary. In *Ewing* v. *Orr Ewing* (2), the confirmation of the Scotch will was sealed by the English Court, and that case is no authority bearing on the present. My proposition is clearly stated in Williams on Executors (10th ed., vol. ii, p. 1565); see also Story's Conflict of Laws, sect. 513. In Westlake on Private International Law (4th ed., p. 105), it is stated, "Whatever the domicile or political nationality of the deceased, his personal property situate in England cannot be lawfully possessed or, if recoverable in England, cannot be sued for without an English grant of probate or administration." There is no proof of assets in this country: *Evans* v. *Burrell* (3); *Preston* v. *Viscount Melville* (4).

MOLONY C.J.:—

This is an appeal from an order of the Master of the Rolls who has refused to make the order for administration asked for in this case on the ground that the grant of administration obtained by the defendant in England has not been re-sealed in this country. I adopt as correct the statement of the law to be found at p. 1565 of Williams on Executors (10th ed., vol. ii),

(1) L. R. 17 Eq. 20.
(2) 9 A. C. 34.
(3) 28 L. J. P. 82.
(4) 8 Cl. 1 F. 1.

based upon Story's Conflict of Laws, sect. 513—. . . "it may be remarked, that no suit can be brought against any executor or administrator, in his official capacity, in the Court of any country but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him." Mr. Rearden has, however, contended that there is jurisdiction to make an order for administration against the defendant resident in this country, although no grant has been taken out here, and the English grant has not been re-sealed ; and for this proposition he has relied upon the decision of the House of Lords in *Ewing* v. *Orr Ewing* (1). It will, however, be seen on examination of this case that it does not support the appellant's contention. There the testator was domiciled in Scotland, and possessed of property both in Scotland and England. The personal representatives obtained a confirmation of the will in Scotland, and, it is important to observe, the confirmation was sealed by the English Court of Probate. As stated by Lord Selborne (p. 38), the appellants contended that "by virtue of the confirmation of the testator's will in Scotland, as that of a domiciled Scotchman (under the statute 21 & 22 Vict. c. 56), they became officers of a Scottish Court, accountable and amenable only to the Courts in Scotland, so far, at all events, as relates to that part of the estate which was locally situate in Scotland; and that the High Court of Justice in England had no jurisdiction to make a decree for the execution of the trusts of the will as to any part of the Scottish personal or real estate." Lord Selborne proceeds to show that this contention was untenable, and that where administration proceedings are properly brought against a person who is clothed with the character of a personal representative in the country where the proceedings are brought, the entire estate, wherever situated, can be administered in that country. He says (at p. 39): "Much of the appellants' argument proceeded upon the fallacy that, because confirmation is necessary in Scotland, and probate (or its statutory equivalent) in England, to clothe executors with the character in each of those parts of the United Kingdom of legal personal representatives of their testator, and because that particular character so acquired is local and territorial, therefore

(1) 9 A. C. 34.

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they ought to be regarded in England as having no duty, office, or character, except that which the English Court of Probate was able to and did confer. But," Lord Selborne proceeds, "by the mere fact of taking out probate, executors, who are also trustees, accept the trusts of the will, as well as the office of legal personal representatives; and the acceptance of those trusts extends to the whole property which, under the terms of the will, is the subject of the trust, real as well as personal, although the real estate cannot be, and part of the personal estate may not be, within the jurisdiction of the Court of Probate." I think this judgment clearly establishes, first that a grant of probate or its statutory equivalent is necessary to clothe a person with the character of executor or administrator in whatever part of the United Kingdom proceedings are brought against him; and secondly that it no way follows, that because the character acquired by such a grant is local and territorial, the administration itself must be local and territorial.

Reliance has also been placed upon sect. 27 of the Probate and Letters of Administration Act (Ireland), 1857, corresponding to sect. 22 of the English statute of the same year, which provides that "all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof." That is a general section enabling documents so stamped to be received in evidence in any part of the kingdom. The section of the English statute does not, however, enable a party to produce an English grant in Ireland, and to contend that, notwithstanding that the grant confers a character upon the person who has obtained it which is local and territorial, the grant is without more to have its full force and effect in Ireland, as if it were an Irish grant. If that were so, it would have been unnecessary to introduce sect. 94 dealing with the re-sealing of probates granted in England. This section as to the necessity of re-sealing an English grant has always been acted upon in this country during the sixty-one years since the Act of 1857 was enacted; and so far as I am aware this is the first time it has been sought to obtain a decree in administration in Ireland

against a personal representative who is not clothed as such with an Irish title. In my opinion, as I have said, the statement in Williams on Executors, based upon the dictum in Story's Conflict of Laws, and corresponding with the passage in Westlake to which we have been referred, is correct, and the appeal must be dismissed.

RONAN L.J.:—

I am of the same opinion. Mr. Burke is clearly right in the proposition with which he commenced his argument, namely, that in any proceedings for the administration of the personal estate of a deceased it is essential that the personal representative of the deceased should be before the Court. In certain cases it may be immaterial whether an essential party to an action is a plaintiff or a defendant. The proceedings may be competent so long as he is before the Court in either capacity, but what is the position here? It is admitted that if this were an action for administration brought by this English administratrix, a decree for administration could not be made. Why? Because there is no legal personal representative in the proper sense before the Court. This being admitted, it is to my mind inconceivable that a decree could be made when the position is reversed and the same person is before the Court as defendant to the proceedings. I am satisfied, from the judgment of Lord Selborne in *Ewing* v. *Orr Ewing* (1), that a grant of probate or of letters of administration only clothes a person with the character of personal representative within the area of the jurisdiction of the Court which makes the grant; the character is "local and territorial" only. That being so, there is no legal personal representative before the Court in the present case, and I accordingly agree that this appeal fails.

O'CONNOR L.J.:—

I agree. The defendant has in England the capacity of a personal representative of this deceased gentleman, and can be sued in England as such, but the moment she crosses the Channel

(1) 9 A. C. 34.

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she becomes a private individual. Accordingly, when administration proceedings are instituted against her in this country, they necessarily fail, because the defendant is outside the jurisdiction of the Court which made the grant. Mr. Rearden has suggested that the defendant is in some respects in the position of a trustee or a quasi trustee, and that as equity acts in personam, she can be sued in this country. I express no opinion on this point beyond saying that the proceedings are not framed against the defendant as trustee. This is an ordinary administration summons brought against an individual as personal representative, and in the result we find that there is no personal representative before the Court. The summons must accordingly fail. If further administration proceedings are to be brought, they must be brought in England; and I think that, in the circumstances of this case and there being no proof of any assets in Ireland, the balance of convenience is in favour of that course.

Solicitor for the appellant: *Barry C. Galvin.*
Solicitors for the respondent: *Wynne & Wynne.*

R. ST. J. C.

IN THE MATTER OF THE TRUSTS OF THE WILL AND CODICILS OF HENRY ARMAND ROBERT PIGOTT, DECEASED.

CONNOLLY MARCUS GAGE AND HENRY CURZON ROPER, PLAINTIFFS; ROBERT EDWARD PIGOTT, ELLEN MARY DE JENNER, AND ADRIAN ROBERT CHARLES DE JENNER, DEFENDANTS; AND BY ORDER TO PROCEED, WILLIAM BAILEY, PERSONAL REPRESENTATIVE OF ROBERT EDWARD PIGOTT, DEFENDANT.

*M. R.*
1917.
June 20, 22.
July 9.
*Appeal.*
1918.
Nov. 8.
Dec. 11.

(1917. No. 104.)

*Timber—Ornamental trees felled and taken compulsorily for military purposes—Settled Lands—Tenant for life unimpeachable for waste—Compensation invested upon trusts of settlement—Equitable waste.*

The Home-grown Timber Committee, acting under the powers conferred by the Defence of the Realm (Consolidation) Regulations, 1914, as amended by an Order in Council of April 12th, 1916, entered upon settled lands the tenant for life of which was unimpeachable for waste; felled and took away, for military purposes, ornamental trees growing in the demesne and paid to the trustees £630 by way of compensation. The tenant for life in possession claimed to be entitled to the money absolutely. The trustees and the tenants in remainder claimed that it should be treated as capital money, and invested and held upon the trusts of the settlement.

*Held*, by the Master of the Rolls, that at the moment of severance the legal property in the trees passed to the Crown; and that the trustees were bound to invest the compensation money, and to hold the investment to the uses and upon the trusts of the settlement.

*Held*, by the Court of Appeal (1) (affirming the decision of O'Connor M.R.), that the money given by way of compensation was paid for damage to the inheritance, and that it must be applied by the trustees as part of the corpus of the estate.

*Held* also, that the principle of the decisions by which windfalls or trees felled by trespassers become the property of the tenant for life, unimpeachable for waste, is not applicable where trees are severed, carried away, and appropriated by the act of an overriding authority.

Per Ronan L.J.: Ornamental trees severed by accident or the wind, or by the wrongful act of a stranger, do not become the property of a tenant for life without impeachment of waste; and in respect of these he is, in equity, treated as if he were impeachable for waste.

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

*M. R.* 1917.

GAGE AND ROPER *v.* PIGOTT AND DE JENNER.

Per O'Connor L.J.: Trees thus severed become the property of the tenant for life, without impeachment of waste; because (*a*) there is no unconscionable conduct on his part, and the prohibition which equity enforces against the doing of anything that impairs the amenity of the inheritance can have no application to that which, in the ordinary course of nature, ceases to be a subject of ornament or amenity; (*b*) the trees had become a chattel by an act over which the unimpeachable tenant had no control, and he had done nothing to disentitle himself to the property in them. The remedy of a remainderman in such a case is an action against the wrongdoer.

ORIGINATING SUMMONS by the plaintiffs, the trustees of the will of Henry Armand Robert Pigott, deceased, for the determination of the following questions:—1. Whether Robert Edward Pigott, the tenant for life in possession, was entitled absolutely for his own use and benefit to a sum of £630, paid to the plaintiffs as compensation for the taking of trees growing on Capard demesne, part of the settled estate, cut and removed by the Home-grown Timber Committee under the powers conferred by the Defence of the Realm (Consolidation) Regulations, 1914, as amended by an Order in Council, dated the 12th April, 1916. 2. Whether Adrian Robert Charles de Jenner, owner of the first estate of inheritance in esse, was absolutely entitled for his own use and benefit to the said sum. 3. Whether the said sum should be invested and such investments and the income held as personalty upon trusts corresponding to the uses declared by the will of Henry Armand Robert Pigott concerning the said estate.

By his will, dated the 17th May, 1877, Henry S. R. Pigott devised the estate to the defendant, Robert Edward Pigott, his son by his first wife, for life, without impeachment of waste, with divers remainders to his sons and daughters in tail. The testator died on the 6th July, 1886. Robert Edward Pigott had never married. His sister Ellen Mary de Jenner was the next tenant for life, and her eldest son Adrian Robert Charles de Jenner was the owner in esse of the first estate of inheritance in the lands.

In August, 1916, the Home-grown Timber Committee, by their agent, entered on the lands, marked out a considerable number of trees, growing in the demesne, for felling, and offered Robert Edward Pigott £630 for same. Mr. Pigott was willing

to accept the sum, but, on ascertaining that he had no power to cut the trees, he refused to sell, and thereupon the secretary of the Timber Committee intimated that they would take the trees under the powers vested in them by the Order in Council of the 12th April, 1916. On the 30th December, 1916, the plaintiffs entered into an agreement with the Timber Committee whereby the said committee provisionally, and subject to confirmation by the Defence of the Realm Losses Commission, agreed to pay £630 as compensation for the taking of the trees. The trees were subsequently felled and removed, and the sum of £630 was allowed and paid to the plaintiffs, the trustees.

*Overend*, for the plaintiffs.

*Macrory*, for the defendant, the tenant for life.

July 9.

O'CONNOR M.R.:—

The summons in this matter was taken out for the purpose of determining who was entitled to a sum of £630 paid by His Majesty's Government by way of compensation for the felling and taking away of timber which stood on the demesne of Capard, in the Queen's County. The timber was taken for military purposes, and it is common case that the payment by way of compensation was voluntary.

The interested parties derive their title under the will of Henry Armand Robert Pigott, dated the 17th May, 1877. Under this will Robert Edward Pigott is tenant for life in possession, without impeachment of waste, with remainder to his sons and daughters in tail; with remainders, which have failed, to the issue of the testator by his second wife; with remainder to his daughter, Ellen Mary de Jenner, by his first wife, for life, without impeachment of waste; with remainder to her sons in tail severally and successively; with remainders over.

Robert Edward Pigott, the tenant for life in possession, has had no issue, and Ellen Mary de Jenner is the next tenant for life in remainder expectant on his death, and his eldest son, Adrian Robert Charles de Jenner, is the owner in esse of the first estate of inheritance in the lands. Connolly Marcus Gage and Henry Curzon Roper are the trustees of the will. All these parties are before the Court.

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The money was paid by Government to the trustees, who now hold it, and ask for the decision of the Court as to how they should deal with it. The tenant for life in possession claims to be entitled to it absolutely. The trustees and the tenants in remainder claim that the money should be invested and held upon the trusts of the will.

It is admitted that the timber which was cut was ornamental timber, and that the tenant for life was not entitled to cut it, and that if he did cut it he would have been guilty of committing equitable waste. But he contends that, as the felling of the timber was not his act, he committed no wrong, and could not have been sued in a Court of equity for waste, and that as tenant for life, without impeachment of waste, he became the absolute legal owner of the timber the moment it was severed from the land. He bases his claim entirely on the circumstance that he is unimpeachable for waste, because it is clear that a tenant for life impeachable for waste has no right to timber which is cut down, or even blown down, and that it belongs to the owner of the first vested estate of inheritance.

To this general rule there is an exception which is noticed by Sir George Jessel in *Honywood* v. *Honywood* (1). It is this: that where for any special reason it is proper to cut down timber, and the tenant for life, impeachable for waste, in a suit properly constituted, to which the remainderman or the owner of the first vested estate of inheritance is a party, gets an order of the Court to have it cut down, then the Court disposes of the proceeds on equitable principles. It directs the proceeds to be invested and the income given to the successive owners of the estate, until the first estate of inheritance falls into possession, when the fund can be paid over to the owner.

Having thus dealt with the case of a tenant for life impeachable for waste, Sir George Jessel says:—"The same course as I understand it (there is a decision of Lord Lyndhurst in *Ormond* v. *Kynnersley* (2) the other way, but modern decisions have settled the law) is adopted in the case of the commission of equitable waste, that is, where ornamental trees, or trees which could not otherwise be cut down, even by a tenant for life, unimpeachable

(1) L. R. 18 Eq. 306, at p. 311. (2) 7 L. J. Ch. 150.

for waste, are cut down; there also, as I understand it, the proceeds are invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement, giving the income to the tenant for life, and so on."

Here Sir George Jessel must be referring to a cutting under an order of the Court, in which case the tenant for life would not be doing any wrongful act, but he is still not allowed to assert his legal right to the severed timber, and the proceeds are invested for the benefit of the successive owners of the estate.

Now it does seem to me that the present case is very like one in which timber is cut under an order of the Court. It has been cut to meet the supreme necessity of the State in a time of war—really for the benefit of the settled estate, for its very preservation—because when a country is engaged in war, all property within it is in jeopardy. Why, then, should not the same principles be applied as in a suit instituted to authorize the cutting of timber for the benefit of the estate? And are not the hands of the Court all the more free to do equity when there is no legal right, as is admitted, to the moneys, and they become subject to the jurisdiction of the Court, only because they are held by trustees in their fiduciary character? Further, it occurs to me that in this case the tenant for life unimpeachable for waste had no legal right to the timber itself when severed so as to found a legal claim. The timber was felled by the Crown under compulsory powers, so that at the moment of severance the legal property in it must have passed to the Crown. It was not even for a point of time in the legal ownership of the tenant for life. For these reasons, I will declare that the trustees are bound to invest the moneys after payment of the costs afterwards mentioned, and to hold the investment to the uses and upon the trusts of the settlement as created by the will of Henry Armand Robert Pigott dated 17th May, 1877.

I will declare all parties entitled to their costs, the plaintiff's costs to be taxed as trustee's costs, and let the same when taxed be paid out of the fund.

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Robert Edward Pigott, the tenant for life, died on the 3rd of November, 1917, and William Bailey, his executor, appealed (1).

*H. Wilson K.C.*, and *Macrory*, for the appellant:—

The question is, whether the money paid as compensation for the timber compulsorily taken belongs to the tenant for life absolutely, or is to be treated as capital money which must follow the destination of the estate. Formerly at common law a limited owner, not impeachable for waste, was entitled to cut down timber, whether ornamental or not, and put the proceeds in his pocket. Gradually equity interfered with the exercise of that power; but only in certain cases did the Court of Chancery interfere, namely, where it was satisfied that the limited owner had made an unconscionable use of his right and committed equitable waste. It is admitted that the tenant for life here has not committed equitable waste, because he did nothing unconscionable. Lord Nottingham was one of the first judges to apply the doctrine of equitable waste. In *Abraham* v. *Bubb* (2), decided in 1680, he laid down that where a tenant for life, without impeachment of waste, committed or intended to commit waste, the Court would moderate the exercise of that power by granting an injunction. In *Aston* v. *Aston* (3), Lord Hardwicke says:—"At common law, that clause, without impeachment of waste, only exempted a tenant for life from the penalty of the statute, the recovery of treble value and place wasted; not giving the property of the thing wasted; but in *Lewis Bowle's Case* (4), it was determined that these words also gave the property; the necessary consequence of which was, that in general, unless in particular circumstances, he was not to be restrained in equity; for that would be to determine that he should not make use of that property the law allowed him." The grounds upon which a Court of Equity will interfere are admirably stated by Lord Justice Turner in *Micklethwait* v. *Micklethwait* (5), where, at page 524, he says:—"This doctrine of equitable waste, although far too well settled in the Court to

(1) In the Court of Appeal before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

(2) 2 Freeman, 53.

(3) 1 Vesey Senior 263.

(4) 11 Co. 79.

(5) 1 De G. & J. 504.

be now in any way disturbed, is (it is to be observed) an encroachment upon a legal right. At law, a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this Court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power." Sect. 28, sub-s. 3, of the Judicature (Ireland) Act, 1877, is a statutory declaration that the common law right of a tenant for life without impeachment of waste is preserved, except in respect of equitable waste.

In this case the appellants did not commit any equitable waste; and, as prima facie the common law principle applies, they are entitled to the value of the trees cut down. *Baker* v. *Sebright* (1) decides that an equitable tenant for life, unimpeachable for waste, is entitled to the proceeds of ornamental timber cut by him, where the timber so cut is such as the Court would itself direct to be cut for the preservation and improvement of the remaining ornamental timber; and at page 185, Jessel M.R. says: "Unless the Court of Equity would restrain a tenant for life from doing the act, it ought not to deprive him of the proceeds of doing it, if what he was doing was not wrongful." There is no direct authority on the point at issue here. At first sight it might seem that some analogy might be found in cases under the Lands Clauses Act. This, however, is impossible, as there is no power under the Lands Clauses Act to acquire timber *alone*, though, of course, growing timber would pass, as part of the "land" acquired. But there are two classes of cases which do, we submit, support our view. According to the first a tenant for life, unimpeachable for waste, is entitled to windfalls: *Lewis Bowles's Case* (2); according to the second class of cases, if a stranger commits waste it belongs to the tenant for life without impeachment of waste: *Anonymous* (3); *Pyne* v. *Dor* (4). These two cases are quoted with approval in *In re Barrington* (5).

The Master of the Rolls has misconstrued what Jessel M.R. said in *Honywood* v. *Honywood* (6). The dictum in that judgment,

(1) 13 Ch. Div. 179.
(2) 11 Coke, 79b.
(3) Mosley's R. 237.
(4) 1 T. R. 55.
(5) 33 Ch. Div. 523, at p. 527.
(6) 18 Eq. 306, at p. 311.

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interpreted by the Master of the Rolls as applicable to all cases in which the conduct of the tenant for life has been blameless, refers in express language to "the case of the commission of equitable waste." There can be no equitable waste if what is done is done under the order of the Court. The case of *Ormond* v. *Kynnersley* (1), referred to in the dictum, was a case of equitable waste committed by a deceased tenant for life whose executors were brought before the Court to make them account for the proceeds of the waste committed by the tenant for life in his lifetime. The judgment of Jessel M.R. in *Baker* v. *Sebright* (2), delivered five years later than his decision in *Honywood* v. *Honywood* (3), is a contradiction of the interpretation placed by the Court below in this case on his dictum in *Honywood's Case* (3).

*S. L. Brown K.C.* and *Overend*, for the respondents:—

The fact that the tenant for life was unimpeachable for waste is immaterial. Although unimpeachable for waste, he was not entitled to cut the trees himself, and had he done so he would have committed a wrongful act. So much of the inheritance has been taken away by the Crown, and where what has happened is, so far as the parties are concerned, accidental, a Court of Equity will do its best to prevent that accident from accruing to the exclusive benefit of one of the parties: *In re Harrison's Trusts* (4), per Fry L.J., at p. 231. In the case of a windfall, a tenant for life is only entitled to such timber as he might cut himself: *Bateman* v. *Hotchkin* (5).

*Wilson K.C.*, in reply:—

In the cases cited by Mr. Brown the tenants for life were impeachable for waste.

*Cur. adv. vult.*

SIR JAMES CAMPBELL C.:—

The appellant in this case, Mr. Robert Edward Pigott, is tenant for life in possession, without impeachment for waste, of the house and demesne of Capard, in the Queen's County, under the provisions of the will and codicils of Henry Armand Robert

(1) 7 L. J. Ch. 150.
(2) 13 Ch. D., 179.
(3) 18 Eq. 306.
(4) 28 Ch. D. 220.
(5) 31 Beav. 486.

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Pigott, deceased. Subsequent to the outbreak of the present war a quantity of timber growing in the demesne was cut down and carried away under the orders of His Majesty's Government for the purposes of the State, and a sum of £630 was paid ex gratia by way of compensation for the removal of the timber to the respondents, the trustees of the said will and codicils. A question having arisen as to the respective rights in this money as between the tenants for life and the parties entitled in remainder to estates of inheritance, the matter was brought by the trustees on summons before the Master of the Rolls for his decision; and by his judgment, to which I will subsequently refer, he decided that the corpus of the fund was not the property of the tenant for life, but must be invested by the trustees and the investments held by them to the uses and upon the trusts of the settlement as created by the will of Henry Armand Robert Pigott.

The tenant for life has appealed from this decision; and in the argument before this Court the question for decision was treated as being upon its special facts one of first impression. For this reason, and also in view of the fact that, owing to the comparatively small amount involved, and as the tenant for life will in any event be entitled to the income of the invested fund for his life, our decision is likely to be treated as final, we have thought it right to investigate the question minutely, and to give the parties the benefit of our considered judgment. It is essential to remember, in the first instance, that the tenant for life in this case was without impeachment of waste, as the failure, in cases where there were conflicting claims to timber as between the tenant for life and the persons entitled to estates of inheritance in remainder, to bear in mind the essential difference for this purpose between the case of the tenant for life without impeachment of waste and that of the tenant for life impeachable for waste, is responsible for an apparent though not real conflict in certain passages and judgments in text-books to which we have been referred in the course of the argument. For example, it must now be taken to be conclusively established as the result of decisions delivered some centuries ago, that the property in timber not ornamental which has been severed from the inheritance as the result of wind or the act of a trespasser belongs to the tenant for

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life, provided he is not impeachable for waste and is in possession; but at first sight this conclusion seems in conflict with the broad proposition on the subject to be found in Halsbury's Laws of England, vol. xxv, p. 602:—"When timber is blown down in a storm it belongs, at law, to the owner of the first vested estate of inheritance; but the rule is, in the absence of improper conduct on the part of the tenant for life, to treat the produce of such timber trees as capital, and allow the interest to the tenant for life." Upon an examination, however, of the authorities cited in support of this proposition, I think it will be found that in every case the tenant for life in possession was impeachable for waste.

If it was intended by this proposition to include the case of a tenant for life in possession who is not impeachable for waste, it would, in my opinion, be inaccurate, as I think it must be taken as settled law that such a tenant for life is entitled for his absolute benefit to the proceeds of all timber which has been severed by the wind or the act of a trespasser, provided he could himself have severed it without committing equitable waste.

The same confusion is responsible for the error which has crept into the judgment of the Master of the Rolls in the present case in his interpretation of the following passage of the judgment of Sir George Jessel in the important case of *Honywood* v. *Honywood* (1):—"The same course as I understand it (there is a decision of Lord Lyndhurst in *Ormond* v. *Kynnersley* (2) the other way, but modern decisions have settled the law) is adopted in the case of the commission of equitable waste, that is, where ornamental trees, or trees which could not otherwise be cut down, even by a tenant for life, unimpeachable for waste, are cut down; there also, as I understand it, the proceeds are invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement, giving the income to the tenant for life, and so on." Referring in his judgment to this passage, the Master of the Rolls says:—"Here Sir George Jessel must be referring to a cutting under an order of the Court, *in which case the tenant for life would not be doing any wrongful act*, but he is still not allowed to assert his legal right to the severed timber, and the proceeds are invested for the benefit of the successive

(1) L. R. 18 Eq. 306. (2) 7 L. J. Ch. 150.

owners of the estate." It is impossible, as it seems to me, to accept this construction of the language of Sir George Jessel, seeing that the very case he assumes is that of a tenant for life who, though not impeachable for waste, has been doing a wrongful act, that is to say, committing equitable waste. In this connexion I think the Master of the Rolls also overlooked the subsequent judgment of Sir George Jessel in the case of *Baker* v. *Sebright* (1), in which he decided that a tenant for life without impeachment for waste is absolutely entitled to the proceeds of ornamental timber, the cutting of which has been sanctioned by the Court, or where the timber has been cut without an order of the Court, and the cutting is of such a character as the Court would itself have directed if applied to. Indeed in view of the fact that the common law right of a tenant for life, not subject to impeachment for waste, to timber, even of an ornamental character, on the estate, is only restrained by a Court of Equity where the acts done amount to equitable waste, in the sense that they are unconscionable, and such as a prudent man would not commit in the management of his estate, it seems to follow that in all cases where the cutting has been subsequently sanctioned or previously directed by the Court, the proceeds should belong to the tenant for life if he is not impeachable for waste. In the present case it is admitted that the timber cut was of an ornamental character, and such as the tenant for life, even though unimpeachable for waste, could not have cut without being guilty of equitable waste; but counsel for the appellants have stated their contention in plain and lucid terms to be this: that all timber, even though ornamental, severed from the inheritance while a tenant for life without impeachment for waste is in possession, becomes his property, provided it is severed without his act, default, or privity, even though such severance would, if procured by the tenant for life himself, have constituted equitable waste; and they rely in support of this contention on the earlier decisions applicable to windfalls or cuttings by trespassers. I was much impressed, as I think were the other members of the Court, in the course of the argument by the apparently close analogy of these decisions, but upon a more careful

(1) L. R. 13 Ch. D. 179.

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consideration I am satisfied that they in no way govern this case. Further, they differ from the present case in one respect which may seem unimportant, but which in my judgment has a direct bearing upon the question, inasmuch as in all such cases of accidents, such as windfalls, the trees, though severed, still remained upon the inheritance, whereas in the present case they were not only severed from the inheritance but also carried away and appropriated by the act of an overriding authority. I think a closer analogy is to be found in cases of the cutting and removal of timber under the compulsory powers of the Lands Clauses Acts. I can find no reference to this analogy in the judgment of the Master of the Rolls, but Mr. Wilson for the appellant did in this connexion refer us to the case *In re Barrington* (1). In that case, minerals which, for our present purpose stand upon precisely the same footing as timber, see *Bagot* v. *Bagot* (2), were devised by will upon trust for B for life without impeachment for waste, with remainder in trust for the defendant for life, likewise without impeachment of waste, with remainders over. During B's life and after his death part of these minerals were won by instroke by the owners of adjoining mines who upon discovering the fact paid compensation for the quantity abstracted.

It was held by Kay L.J., applying the principle of the decisions in the windfall cases, that the amount of the compensation belonged to the estate of B and the defendant, each getting the portion representing the value of the minerals abstracted during their respective lives. This case supplies the missing link in the analogy to the present case of the decisions as to windfalls, because in it the severed minerals were not left upon the ground, but were converted to their own use by the adjoining owners, and therefore to this extent it fortifies the position of the tenant for life. I find, however, that in a subsequent case, which was not referred to in the argument, Mr. Justice Chitty upon somewhat similar facts declined to give the proceeds of the minerals to the tenant for life, and decided that they must be converted and applied in accordance with the trusts of the settlement. I refer to the case of *In re Robinson's Settlement Trusts* (3), in which a railway company had acquired under the powers of their special Act, which incorporated

(1) 33 Ch. Div. 523. (2) 32 Beav. 509. (3) [1891] 3 Ch. 129.

the Railway Clauses Consolidation Act, 1845, certain portions of a settled estate, but the conveyance to them contained no special reference to mines or minerals. A subsequent tenant for life without impeachment of waste of the settled estate gave notice to the railway company, under sect. 78 of the Act of 1845, of his intention to work minerals under or adjoining the railway. His right to do so was challenged, and after protracted litigation had been affirmed in the House of Lords (1). He then agreed to sell the minerals to the railway company for the sum of £1519, and executed a conveyance to them as tenant for life under the statutory powers of the Lands Clauses Consolidation Act, 1845, sect. 7. The amount of the compensation was arrived at upon the assumption that one portion of the minerals, representing £687 19*s.* 9*d.* of the purchase-money, could be wholly worked out in five years; another portion, representing £773 11*s.* 6*d.*, in eight and fifteen years respectively; and the remaining portion, representing £57 16*s.* 5*d.*, in twenty years. The tenant for life was aged forty-seven years, and claimed the whole of the compensation money on the ground that in all human probability he would have been able to win the whole of these minerals in his lifetime. He insisted that in any event he was entitled to the £687 19*s.* 9*d.* representing the value of the minerals that could have been worked out in five years, on the special ground that he gave notice of his intention to work these minerals in January, 1886; and had it not been for the litigation between himself and the company, which only ended in his favour in December, 1889, he would in the interval have worked out minerals of value to the amount claimed, and strenuously argued that the decision of *In re Barrington* (2) was a conclusive authority in his favour. Chitty J., however, decided that the proceeds did not belong to the tenant for life, but must follow the destination prescribed by the Lands Clauses Act, 1845, sect. 69, which in effect, subject to the discharge of the incumbrances, directs the proceeds to follow the trusts of the settlement. While not expressly dissenting from the decision of *In re Barrington* (2), he pointed out that as the mines were under lease in that case, the fee of the settled estate was not affected, and that the case therefore came under sect. 74 of the

(1) 15 Ap. Cases, 19.

(2) 33 Ch. Div. 523.

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Lands Clauses Act, 1845, and not under sect. 69. Apparently, however, he was also of opinion that the principle of appropriation applied by Kay L.J. was erroneous, because he points out that even under that section the compensation must be apportioned between the respective interests, so that, for example, if the life of the mine was twenty years, the money should be divided into twenty equal parts, one-twentieth part going to the tenant for life for each year of his subsequent life, being, in fact, the measure of his rights under the settlement. He then shows that the policy of the Legislature was consistent in this respect, as illustrated by the statutory power of the tenant for life to sell mines and minerals under the Settled Land Act; and he also refers to the usual powers of sale to be found in settlements. He concludes with these words:—"The Lands Clauses Consolidation Act has now been in force for over forty-five years [now over seventy years], and I am unable to remember any instance in which a tenant for life has succeeded in obtaining any portion of the compensation money in a case of this kind."

The class of cases of which *In re Robinson's Settlement Trusts* (1) is an example is the closest analogy to the present that I have been able to find, closer than that of the severance of timber by wind or trespasser, inasmuch as the element of legal compulsion, which is absent from the latter, is to be found in the former, in which also, as in the present case, the minerals won, or the severed trees, were converted in the operation. It is true that the analogy fails in completeness in one respect, for the destination of compensation allowed for property requisitioned for the defence of the realm is not controlled by statute; but the declared policy of the Legislature, "in pari materia," cannot be disregarded in a question of the kind. I can find many reasons for the conclusion that the tenant for life should not be prejudiced even by the paramount right of the State to interfere with his property in times of national emergency, but I fail to find any reason for allowing him to profit in such circumstances, or why the proceeds of such interference should not follow the trusts of the settlement under which he derives his

(1) [1891] 3 Ch. 29.

estate. A tenant for life, even though free from impeachment of waste, and with express power to sell minerals or timber, is not allowed to pocket the proceeds, but must hold them upon the trusts of the settlement: *Doran* v. *Wiltshire* (1). A very eminent judge, Fry L.J., in the case of *In re Harrison's Trusts* (2), declared it to be a principle of Courts of Equity to struggle, so far as may be, to prevent accidents interfering with the rights of parties. In obedience to that principle I must decline to allow the tenant for life in this case to capture, at the expense of those entitled to the inheritance in remainder, the proceeds of a portion of the corpus of the estate which, by the accident of this war, has been converted into money, and, in affirming the decision of the Master of the Rolls, I am giving the tenant for life the income for life of a fund which his counsel concedes he could not himself have realized except by the tortious commission of an act of equitable waste.

I should like to say, in conclusion, that I am not deciding that the principle of the decision I have given would apply to cases where ornamental timber is severed from the inheritance by windfall or act of a stranger. This point does not necessarily arise for decision in the case before us; but it is a matter to remember that the cases relied upon by Mr. Wilson on behalf of the appellant were all cases of great antiquity—*Lewis Bowles's Case* (3); *Anonymous* (4); and *Pyne* v. *Dor* (5). The last of these, which is the latest in point of date, was decided so far back as 1785; and under the common law at that time a tenant for life, without impeachment of waste, had an unrestricted right to cut down timber, and the power of a Court of Equity to interfere with that right by applying the doctrine of equitable waste had seldom been exercised.

In my opinion the decision of the Master of the Rolls is right, and should be affirmed, but in the special circumstances all parties should be allowed their costs out of the fund.

(1) 3 Swanston, 699.
(2) 28 Ch. D. 220.
(3) 11 Co. 79*b*.
(4) Mosley's Rep. 237.
(5) 1 T.R. 55.

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RONAN L.J.:—

This is not a case of waste. It is a case of an act by an outsider which would be unlawful unless authorized by statute or prerogative. "Waste is an act or omission by the tenant in possession occasioning the destruction of, or injury to, houses, gardens, woods, etc., to the disherison of him in the reversion or remainder" (Co. Litt., 53*a*).

I shall first deal with the case as it was dealt with by the Master of the Rolls, and as it was argued before us, i.e. as a question simply of the property in the timber when cut. The facts of the case for this purpose are stated in the judgment of the Master of the Rolls. There is a suggestion in one of the affidavits that these are trees which the tenant for life might have lawfully cut. I use the word "lawfully" (in the sense suggested by Bowen J., in *Dalton* v. *Angus* (1)) as meaning both at law and in equity. However, no such question is open in the present appeal. As the Master of the Rolls states in his judgment, "It is admitted that the timber which was cut was ornamental timber, and that the tenant for life was not entitled to cut it, and that if he did cut it he would have been guilty of committing equitable waste." Mr. Wilson at once admitted that the case must be dealt with on this basis. Apart from the "without impeachment of waste" clause and the doctrine of equitable waste, the fundamental common law principle is that growing timber trees are parcel of the inheritance, and that if they come down by any means and become chattels, they become the property of the first owner of a vested estate of the inheritance, for he would be the first person who would have had the right to convert them into chattels. The proposition as to the trees being part of the inheritance is shown in a strong light in the statement of the law in the *Saltpetre Case* (2) as to the prerogative right to enter on private land and do acts thereon. The statement in 6 Halsbury, p. 448, is very limited, viz.: "In time of war the Crown may enter on the land of a subject (*a*) to erect fortifications, or (*b*) to dig for saltpetre." The authority for (*b*) is the *Case of Saltpetre* (2). In the case of *A Petition of Right* (3), this case is referred to by Lord Cozens-Hardy as the only case he

(1) 6 A. C. 740, at p. 780. (2) 12 Coke Rep. 12. (3) [1915] 3 K. B. 649.

thought it necessary to refer to as to the extent of the prerogative. It is also the only case referred to by Warrington L.J., who agreed with him on the question of prerogative, Pickford L.J. expressing no opinion.

The first point in *The Saltpetre Case* (1) is, "that the king may take [the saltpetre] according to the limitations following, for the necessary defence of the kingdom." The second point contains the limitations, thus: "Although the king cannot take the trees of the subject growing on his freehold and inheritance, as it was now lately resolved by us the Justices of England. . . . Yet it was resolved that he may dig for saltpetre for this that the ministers of the king who dig for saltpetre are bound to leave the inheritance of the subject in so good plight as they found it, which they cannot do if they might cut the timber growing, which would tend to the disinheritance of the subject, which the king by prerogative cannot do."

Lands with growing timber are settled on A for life, remainder to B for life, remainder to C in fee. Each is entitled to the use and benefit of the trees during his estate. A or B cannot cut down or appropriate the timber trees. C cannot do so until after the deaths of A and B. Equity would restrain him if he attempted to do so, and hold him answerable for the proceeds if he did. What was to happen if the trees were blown down by a storm or wrongfully cut by a stranger? The rule of the Common Law was clear. They vested in C, and he was put in the same position as if he had been tenant in fee in possession. The right of A and B to the use of the trees during their lives was ignored. This was obviously unjust to A and B; but, up to 1750 at all events, Equity had not interfered with the rule. The following passage in the judgment of Lord Hardwicke in *Garth* v. *Cotton* (2) shows this:—"When the trees are severed the property must vest immediately in somebody, and that can only be the first remainderman of inheritance vested; and on the foundation of that property he may maintain trover for them." This is his right at law; and there is in the case put of trees fallen by accident, or merely by the wrongful act of a stranger, or of the tenant for life, no ground of equity to take it from him. This was the result of the common

(1) 2 Coke Rep. 12. (2) 2 White & Tudor, 8th edn., 992, at p. 1008.

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law necessity for absolute vesting of a chattel. Equity interfered and adopted the rule stated in *In re Harrison's Trusts* (1), a decision of Baggallay, Bowen, and Fry L.JJ. Baggallay L.J. says:—"Now, the rule, as far as regards the produce of timber trees when they have been blown down, has gone this length, that in the absence of any improper conduct on the part of the tenant for life, the produce of the trees is treated as capital, and the income allowed to the tenant for life. Where there has been irregularity of conduct on the part of the tenant for life, leading to an improper thinning of trees, then the severe rule of the Court has not unfrequently been put in force, and he gets no interest for his life, but the whole of the produce is carried to capital, and, no doubt, on the ground that in cases of that kind the capital has been reduced by reason of the cutting before the timber was ripe for the purpose." Fry L.J. says (at p. 231):—"I rely on that principle which is followed in Courts of Equity by which, as far as may be, they struggle to prevent accident interfering with rights of parties." This plainly did justice to all parties.

This rule is now settled law: 25 Halsbury, p. 602. It was applied by Romilly M.R. in 1862. A tenant for life, impeachable for waste, has a limited power of cutting, thinning, etc. In *Bateman* v. *Hotchkin* (2) some timber was blown down by a storm. The tenant for life and the remainderman both claimed the timber. Lord Romilly said:—"I am of opinion that the tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops."

It is important to remember that the rule in *In re Harrison's Trusts* (1) is quite independent of the doctrine of equitable waste. It is an absolute overruling in equity of the principle laid down in *Lewis Bowles's Case* (3), cited by Mr. Speed in *Bateman* v. *Hotchkin* (2), and puts an end to the right of the remainderman to the exclusive property in the trees. It converts that right into gift of the income of the proceeds to the tenant for life, and of the corpus to the remainderman in fee.

(1) 28 Ch. Div. 220, at p. 288. (2) 31 Beav. 486. (3) 11 Co. Rep. 79*b*.

Further, it is to be observed that in the judgment of Lord Hardwicke he makes the position of the remainderman the same whether the trees are severed, 1, by accident, 2, by the wrongful act of a stranger, or, 3, by the wrongful act of the tenant for life. He puts all on the same footing. Applying the modern rule in the place of the absolute right of the remainderman, it follows that in any of these cases the produce of the trees should now be dealt with on the principle adopted by the Master of the Rolls in this case. The adoption of this principle by equity in relation to the property in fallen trees is, in my opinion, a conclusive answer to Mr. Wilson's argument that in dealing with timber equity only interferes with the common law rights of property in case of unconscionable or unlawful conduct on the part of the tenant for life. On the contrary, the modern law and Lord Hardwicke's judgment put the three cases I have mentioned on the same footing, i.e., that accident and the wrongful act of a stranger have the same effect as the wrongful act of the tenant for life. This is not, perhaps, strictly accurate, as in the latter case the tenant for life may be deprived of the income during his life, and it may be given to the person next entitled in remainder.

I shall now deal with the effect of the "without impeachment of waste" clause. The principle of the decision in *Lewis Bowles's Case* (1) as to this seems to me to be contained in the following two passages, which must be read together. Mr. Wilson's entire case was based on the latter:—"The clause of 'without impeachment of waste' gives *a power* to the lessee which will *produce an interest in him if he executes his power* during the privity of his estate. . . . It was resolved that the said woman by force of the said clause of 'without impeachment of waste' *had such power* and *privilege* that though in the case at bar no waste be done because the house was blown down per vim venti without her fault, yet she should have the timber, which was parcel of the house, and also the timber trees which are blown down with the wind, and when they are *severed from* the inheritance either by *the act of the party* or of the *law*, and *become chattels*, the whole property of them is in the tenant for life by force of the said clause." The italics are

(1) 11 Co. Rep. 79*b*.

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mine. It is obvious that the latter proposition depends on the power to cut and appropriate timber in the former. It seems to me that the whole principle of the judgment is this: the tenant for life had his whole life to execute the power, the execution of which would "have produced an interest in him," i.e., given him the property in the fallen trees. He is, without any default on his part, deprived of his right to execute this power. He shall be treated as if he had executed it. The wrongful act of a stranger or the action of the wind shall be treated as an execution of the power which he was thereby prevented from executing.

In no case until the present, as far as I know, has it ever been argued that the tenant for life is entitled to the property in fallen trees where he would not have been entitled to cut them himself. So far for the common law.

How does equity deal with the question? For the purpose of the present case the principle may be stated thus: Timber trees are divided into—1, ornamental and sheltering; 2, ordinary. The common law power given by the "without impeachment" clause shall not extend to 1, but shall be confined to 2. Therefore as to 1, the tenant for life without impeachment of waste is in equity treated as if he were impeachable for waste, i.e., he will be restrained from cutting and made account for the profits if he cuts. In equity the trees are parcel of the inheritance which he has no power to cut or appropriate. How can it possibly be argued that where the common law gives him the property because he could have cut, equity should give him the property when in equity he could not have cut? Surely in such a case equity should follow the common law in cases where he could not cut. The notion seems to me absurd, that equity should allow the property in these trees to be regulated by the existence of a legal power which it holds to be inequitable in relation to these trees. This, I think, explains the absence of express authority on the point. However, some of the cases seem to involve it. I think the case in Mosley, though very short, recognizes the true view.

At law the "without impeachment of waste" clause applied equally to ornamental and other timber. The distinction was only taken in equity. As to timber, equitable waste was really cutting timber, which a Court of Equity would not permit a tenant without

impeachment of waste to cut. The distinction between ornamental and other timber could, therefore, only arise in the case of a tenant without impeachment of waste. The anonymous case in Mosely, p. 238, was a motion to dissolve an injunction dealing with timber cut down by a stranger. The Court distinguished between the ornamental and the other timber. As to the other timber generally, it dissolved the injunction, "for, though there have been great variety of opinions formerly, it is now settled law, that if a stranger cut down timber it belongs to the tenant for life." This is the ground for dissolving this injunction, "because it belongs to the tenant for life who is dispunishable of waste." But as to the ornamental timber cut down by the stranger, the Court continued the injunction. Why? Plainly because the same reason did not apply, as it did not belong to the tenant for life without impeachment of waste. It is obvious that this must be the reason why the injunction was dissolved in the one case and not in the other.

If Mr. Wilson's argument be correct, there should have been no distinction between the ornamental and the other timber in this case. All would have vested alike in the tenant for life.

*Pyne* v. *Dor* (1) is a very interesting case. It illustrates Lord Mansfield's well-known attempts to do what was only done by the Judicature Acts, i.e., to apply to the Common Law Courts the principles theretofore only recognized in equity. The facts were: Lands settled on A for life without impeachment of waste; remainder to B in tail; A cut down timber, part of which was ornamental, part not; B brought an action for trover for the timber. It is obvious that A was entitled to cut down and appropriate the ordinary timber, and that B's right to the ornamental timber was purely equitable. Lord Mansfield says:—"As to the distinction between waste and destruction, it has lately been introduced into the Court of Chancery; and I agree with the counsel at the Bar that when a general rule of property is established by a Court of Equity, it should be followed by a Court of Law, that their decisions may be uniform." He refers to the equitable principle as to ornamental timber; and then says:—"In this case the distinction

(1) [1785] 1 T. R. 55.

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between ornamental and other timber is not made. Damages were not given on such a distinction, for they were very inconsiderable—only £20. I am of opinion the plaintiff cannot maintain this action." That is because the plaintiff at the trial did not make the case that the property or the ornamental timber as distinguished from the rest was his. The distinction between "waste and destruction" was the doctrine of equitable waste. The case was twenty-five years after *Garth* v. *Cotton* (1). This brings me to the Judicature Act, which carried out what Lord Mansfield wished but failed to do. For the reasons I have stated I am of opinion—1. That the right of the tenant for life without impeachment of waste to fallen timber depended on his right to cut it. 2. That this principle was adopted in equity in respect of ornamental timber, cut or fallen, to which the Court held the "without impeachment of waste" clause did not extend.

The Judicature Act (3), sect. 28, sub-s. 11, says: "The rules of equity shall prevail." But it does not stop there. Sect. 28, sub-s. 3, says: "An estate for life without impeachment of waste shall not confer or be deemed to have conferred on the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument." There is no such intention in the present case. Therefore, in this case, the tenant for life was in respect of the trees in question both at law and in equity impeachable for waste. This is to my mind conclusive, as this section excludes the timber the subject of the present case from the operations of the common law power dealt with in *Lewis Bowles's Case* (2). Further, it seems to me that the case of timber cut by the State for the safety of the realm is analogous to the case of timber cut by order of the Court for the benefit of the estate where none of the parties was entitled to cut it, and that the Court ought to direct the proceeds to be treated in the same way, that is, in the way directed by the Master of the Rolls in this case.

I think, however, that the case should be dealt with on a different principle. We must see what the funds we are dealing with really represent, and what are the rights of the various

(1) 2 White & Tudor, 8th ed. 992. (2) 11 Co. Rep. 79b.

(3) 40 & 41 Vict. c. 57.

parties in respect thereof. It is, in my opinion, a mistake to deal with this case as a mere inquiry as to the rights of certain persons in certain trees after they had been cut down and removed. The loss and damage sustained by the parties were precisely the same as if a stranger had wrongfully entered and cut down and removed the trees.

A Royal Commission was appointed in March, 1915. Its report is printed at pages 367, 368 of Supplement 3 to the Manual of Emergency Legislation. The essential words are "to inquire and determine what sums ought in reason and fairness to be paid to applicants . . . resident in the United Kingdom in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property . . . in the United Kingdom through the exercise by the Crown of its rights and duties in Defence of the Realm." The title of the Commission is "Royal Commission as to Compensation in respect of loss or damage to property occasioned by exercise of rights and duties in the Defence of the Realm."

It appears from the documents that the money in the present case was compensation awarded by this Commission (strictly speaking, reported by them, and paid in pursuance of their report).

What was the property interfered with in this case? A residence with valuable ornamental timber. What was the interference? 1. Entry on the property. 2. Cutting the timber. 3. Removal of the timber when cut. It was not the taking of cut or fallen timber; if it were, the compensation would obviously be the value of the cut timber and would be payable to the owner of the timber. The case is totally different. What was taken was growing timber, part of the inheritance as pointed out in the case in Coke, and which none of the several parties interested in it had a right to cut, or convert from being part of the inheritance into a chattel. The owner of an estate of inheritance in possession would alone have that right. The money, therefore, is compensation for the loss and damage sustained by the parties from the interference with their property.

What is the universal principle of compensation in the case of the exercise of statutory powers? Lord Parmoor in his well-known book

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on compensation puts it in a sentence: "The question is not what the person who takes the land will gain by it, but what the person from whom it is taken will lose by having it taken from him." This principle was fully adopted by this Court in *In re Close's Estate* (1).

Let us first take the case of an owner in fee. He can cut the trees and sell them if he likes, but he is under no obligation to do so. The value of the place is, say, £10,000; the market price of the cut timber is £500. The removal of the ornamental timber will depreciate the value of the place by £1000. It is obvious that in the words of the Commission the substantial loss and damage sustained by him is £1000. He is not going to depreciate the value of his place by £1000 in order to get £500.

More extreme cases could be put. A small number of beautiful trees may constitute the great charm of a residence on the Thames. It would be absurd to say that the wrongdoer who cut them down could escape liability in an action by handing over the fallen timber to the owner.

The entire compensation payable to all the parties interested in the land must be the same as that payable to the owner in fee if a single person. How is it to be apportioned? By ascertaining what loss each has sustained. In dealing with this, for the reasons stated in the former part of my judgment, I ignore the "without impeachment of waste" clause, as it does not apply to these trees.

In the present case the lands, with the trees growing on them, are limited to A for life, remainder to B for life, remainder to C in tail. The trees have neither been blown down nor cut by a stranger. Neither A, B, nor C had any right to cut them down. A has the right to the land, with the trees on it, for life; B ditto. C has the right to have them kept on the land for his benefit after the deaths of A and B. C can do what he likes with them. He will then be in the same position as the tenant in fee. Each can sell or let the land for his own term. Let us assume that the value of the estate, with the trees, is £10,000, and that the removal of the trees reduces it to £9000. What loss does each of them sustain, the total loss being £1000? A has a life estate in a property worth £9000 instead of £10,000;

(1) [1905] 1 I. R. 207, 371.

B ditto; C an estate of inheritance in £9000 instead of £10,000. Surely the appropriation of the £1000 compensation is obvious, i.e., the general rule adopted by the Master of the Rolls. On the other hand, if the value of the trees was very great, and the injury to the property was slight, the tenant in fee in possession might elect to say, "I could have cut and sold these trees for £5000," and claim that sum.

So I think if A, B, and C agreed to join in one action, and agreed between themselves as to the division, they might take a similar course. If they did bring a joint action on this basis, without agreeing as to distribution, I think the only course the Court could take would be to apply the general rule as to corpus and income. There can be no doubt that if a stranger had wrongfully done these acts A would have had an action for trespass, and B and C, respectively, actions for the injuries to their respective reversions, and the measure of damages in each case would be what I have stated.

O'CONNOR L.J.:—

I agree with the result of the judgments of the other members of the Court. Lord Justice Ronan, however, has expressed opinions differing from those I have formed on the subject of the doctrine of equitable waste, and accordingly I feel bound to state my views on that subject, with the natural diffidence I feel, having regard to the opinion of my colleague.

Waste means damage to the inheritance; and if a grant of an estate is made to a tenant for life "without impeachment of waste," that means, literally, that the tenant for life shall not be liable for any damage to the inheritance permitted or wrought by him, however reckless, extravagant, or wanton. It would follow from this, that not alone could the tenant for life without impeachment of waste work such damage at his will, but he could take the benefit of it. Thus, if he knocked down a building, or felled ornamental timber, the materials of the building, or the timber when felled, being chattels severed from the inheritance, became his to do what he pleased with.

It was felt, even in the earliest days, that a power of this kind, unlimited as it was, and liable to gross abuse, was not according

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to the real intention of the instrument creating the estate. It was, indeed, obviously repugnant to the intention of the grantor, who, in carving out the life estate and other estates in remainder, might be presumed to be as much concerned for the preservation of the inheritance for the remainderman as for the limited enjoyment of it by the life tenant. Accordingly, the Courts of equity proceeded to give the grants creating a tenancy for life without impeachment of waste a construction more consonant with the real intentions of the grantor; and the doctrine whereby this construction is applied is known as the doctrine of equitable waste. As I conceive it, it is this: that while a tenant for life unimpeachable for waste would in a Court of law (obliged as it was to construe his grant strictly according to its terms) be held entitled to work or permit waste of any kind, in a Court of equity he would be held not entitled to commit waste of a malicious, wanton, extravagant, or unreasonable character, such, for example, as levelling buildings or cutting ornamental timber. That kind of waste has been referred to in some of the cases as unconscionable waste; and the equitable construction of grants of that kind accordingly was "with impeachment for unconscionable waste, but otherwise unimpeachable for waste." As a natural corollary of this interpretation, the Courts of equity held that an unimpeachable life tenant could not take the benefit of such unconscionable waste, the proceeds whereof are invested and the income given to the successive owners, until it reaches to the owner of the first absolute estate of inheritance, who can take the money: *Honywood* v. *Honywood* (1). Now it will be observed that the exception as to unconscionable waste thus engrafted by the Courts of equity on the terms of the grant was this—that it included, and included only, waste (*a*) done by the tenant for life, and (*b*) of such a kind that no reasonable or right-minded person in his position would do it. The exception went no farther, and unless any given case comes within it, the freedom to commit and take advantage of waste conferred by his grant on the tenant for life remained unstrained and unaltered. The Judicature Act did not, in my view, alter or affect the doctrine of equitable waste, save to this extent—it made that a common law rule which theretofore had been merely an equitable doctrine.

(1) L.R. 18 Eq. 306, at p. 311.

This case deals with ornamental timber. Ronan L.J. is of the opinion that ornamental timber which falls or is blown down does not become the property of a tenant for life unimpeachable for waste. With great respect, I cannot agree. In the first place; in my opinion, it is not waste within the equitable exception to the unimpeachable tenant's power to commit waste, for it is not the result of any unconscionable conduct on his part, or of any act of his at all. In the second place, the prohibition which equity implies against the doing of anything that impairs the amenity of the inheritance can have no reference to that which, in the ordinary course of nature, ceases to be a subject of ornament or amenity. I think this follows from the doctrine of equitable waste, as I understand it, as well as from the cases cited by Mr. Wilson in his persuasive argument.

A further question has been discussed before us as to the property in ornamental timber standing on an estate in the possession of an unimpeachable tenant for life, felled by the tortious act of a stranger without any collusion on the part of the tenant for life. In this case we have that which formed part of the inheritance ceasing to be part of the inheritance and becoming a chattel by an act over which, ex hypothesi, the unimpeachable tenant has no control. In my view, the chattel thus severed is the property of the unimpeachable tenant, for he has done nothing to disentitle him to it. The remedy of the remaindermen lies in their action against the wrongdoer, who will be responsible to them for such damage as a jury or other tribunal may award, having regard to the extent of the damage, and to the nature of the respective interests in the estate of which they will, at one time or another, be in possession. The tenant for life may also have his action, but in his case the damages will be minimized or perhaps reduced to zero by the consideration that the tortious act of which he complains has given him a right to a chattel which formerly belonged to and formed part of the inheritance, and could not, as such, be touched by him. The view that I take on this point was the view, as it seems to me, adopted by Kay J. in *In re Barrington* (1) as to minerals won by the act of a trespasser. It may seem an anomaly that the act of a stranger should create for the tenant for life a property which he could not

(1) 33 C.D. 523.



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create for himself. Properly considered, I think there is no anomaly at all; and certainly there is no greater anomaly than the principle well settled—that when things are severed from the inheritance by a trespasser while an impeachable tenant for life is in possession, they become at once the property of the owner of the first vested estate of inheritance, to the detriment of an unimpeachable life tenant whose estate is sandwiched between the estate of the impeachable life tenant and that of the owner of the inheritable estate. (See White and Tudor's Leading Cases in Equity, 8th ed., vol. ii, p. 1050, and cases there referred to.)

I have thought it right to say this much in reference to matters pressed on us by Mr. Wilson, and on which the other members of the Court have thought it necessary to express an opinion. But in truth I decide this case, while holding with Mr. Wilson so far, on quite other grounds, concerning which there is no difference of opinion amongst the members of the Court. We must look at the nature of the moneys, the subject of this litigation. What are they? As pointed out by the Lord Chancellor and by Ronan L.J., they represent, not mere payments for so many cubic feet of timber, but compensation for damage done. To what and to whom is that damage done? Obviously, to the inheritance; surely, not merely to the tenant for life, but to him and to all claiming after him, according to their respective estates and interests. Suppose that, under the Defence of the Realm Regulations, a mansion house was destroyed for military purposes, could it be seriously contended that the entire payment by way of compensation should find its way into the pockets of the tenant for life? I think it could not. The lawful acts which not alone felled the trees but took them away, have damaged the inheritance; it is impossible to replace the damage; it is possible to compensate for the damage; that has been done by the grant of this money, which, having regard to the terms of the Royal Commission reference read by Ronan L.J., was meant to compensate the various owners according to their respective interests for the damage done, and was not meant as a mere payment for timber.

Accordingly I agree that this money should be paid to the trustees to be applied by them as part of the corpus of the estate.

Solicitors for the appellant: *S. S. & E. Reeves & Sons.*
Solicitors for the respondents: *H. & W. Stanley.*

C. L.

## IN RE MARTIN; EX PARTE ALEXANDER.

M. R.
1918.
Dec. 3.

*Solicitor — Bill of Costs — Taxation — Discretion of Taxing master — "Extraordinary Case"—Solicitors' Remuneration Act*, 1881—*Schedule II, General Orders*, 1884.

The taxing master refused to allow A., a solicitor, certain items in a bill of costs incurred in relation to the preparation of two mortgages executed by M., on the grounds that it was "an extraordinary case" coming within Schedule II, General Orders, 1884, made under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), and that he was entitled to use his discretion in diminishing the bill.

*Held*, that the taxing master in "an extraordinary case" has power to diminish or increase any charges prescribed in the schedule.

SUMMONS to review the taxation of a bill of costs.

Alexander had acted as solicitor for himself and other mortgagees in advancing money to Martin on the same property. The mortgages began in the year 1916, and the two which were the subject of taxation were dated February 16th, 1917, and March 23rd, 1917, respectively. The bill of costs was drawn by items under the old system as altered by Schedule II, General Orders, 1884, under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), and, as drawn, exceeded the scale fees allowable under Schedule I. The Master lumped the items dealing with the mortgages, and allowed in each case the scale fee as a quantum meruit, on the ground that this was an "extraordinary case" within the meaning of those words in Schedule II. The solicitor had previously investigated the title in connexion with the same property; the deeds of mortgage were practically copies of previous mortgages, not requiring the same skill and care as if an independent solicitor had had to prepare the deeds.

*M'Gonigal K.C.* and *Charles Murphy*, for the appellant.
*S. L. Brown K.C.* and *Hubert Hamilton*, for respondent.

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*In re* MARTIN.

O'CONNOR M.R.:—

The facts in this case are simple. Martin having come in for a share of his father's estate began to require money, and proceeded to borrow from several persons who were Mr. Alexander's clients. On February 15th, 1917, he executed a mortgage for £200, several previous mortgages having been made to three different clients on the same property. Alexander himself had also lent Martin money on the same property on three different occasions. It must be obvious that practically the only thing that Alexander had to do was to draw a mortgage to himself in exactly similar terms to the previous mortgages. In fact, he had nothing more to do than to make a copy of the mortgage already in existence.

In the bill of costs under taxation the second item charged is sixty folios at 2*s.* per folio according to the scale fee in Schedule II. Now this is intended to cover not only scrivenery but also all mental labour as well. But the same work had been done before, and all that was necessary was merely to copy a document already in existence. Was this therefore an "extraordinary case" which is specially provided for by Schedule II? I do not think that every case in which there is a further mortgage is an "extraordinary case," but there are certain cases in which the ordinary fees are not the proper measure of remuneration, and I think that these are "extraordinary cases" within the meaning of Schedule II. I am of opinion that the taxing master was quite right in regarding this as an "extraordinary case," and in his discretion awarding a quantum meruit instead of going into each item, and I confirm his certificate.

Solicitor for appellant: *Alfred W. Glover.*
Solicitor for respondent: *A. Lane Joynt.*

R. R.

WILLIAM GILTRAP AND HAROLD PHILIP EARL, PLAINTIFFS; MARY ELLEN EARL AND EDITH NIXON, DEFENDANTS.

*M. R.*
1918.
Nov. 6.
Dec. 3.

*Settlement—Construction—Estate for life or in tail—Absence of words of Limitation—Intention.*

By a marriage settlement executed in 1865, a fee-simple estate was limited to trustees from and after the solemnization of the marriage to the use of the husband for life with remainder to the use of the wife for life with remainder to the first and other sons of the marriage in tail male, with remainder, if there should be only one daughter of the marriage, to the use of such only daughter and her assigns, and if there should be more than one such daughter, "to the use of all such daughters and the heirs of their respective bodies in equal shares as tenants in common," with remainder, "if any one or more of the said daughters shall die without issue then as well as to the original share or shares of the daughter or daughters so dying as to the share or shares that shall have survived or accrued to such daughter or daughters or to the heirs of her or their body or respective bodies to the use of the others or other of the said daughters and the heirs of their or her respective bodies or body, and if more than one, in equal shares and in default of such issue," remainders over. There was issue of the marriage, one son and one daughter. The son having died without male issue, and without having disentailed,

*Held*, that on the true construction of the deed, the surviving daughter was entitled to an estate tail in possession, and not a life estate only.

This was a summons instituted by the plaintiffs as trustees of the will of Thomas C. Nixon, deceased, for the determination of the question whether the defendant, Mary Ellen Earl, was, under the limitations of the indenture of settlement hereinafter mentioned, entitled to the lands of Bennekerry, in the county Carlow, comprised in the settlement for an estate in possession as tenant for life, with remainder to the defendant Edith Nixon, as heiress-at-law of Bartholomew B. E. Nixon, deceased, or for an estate in possession as tenant in tail of the said lands.

By indenture, dated the 27th day of February, 1865, and made between George John Nixon of the first part, Emily Plant of the second part, and Bartholomew B. E. Nixon and James Plant as

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trustees of the third part, being the settlement executed in contemplation of the marriage then intended and afterwards solemnized between the said George John Nixon and Emily Plant, after reciting inter alia that the said George John Nixon was entitled to a divided moiety of the lands of Bennekerry, in the county of Carlow, held in fee-simple, and that upon the treaty of the marriage it was agreed inter alia that the said George John Nixon should convey and assign all his right, title, estate, and interest in the lands of Bennekerry and other lands to the trustees therein named, their heirs and assigns, upon and for the trusts, intents, and purposes thereinafter expressed and declared of and concerning the same. It was thereby witnessed that George John Nixon thereby granted to the trustees, their heirs and assigns, the lands of Bennekerry and the other lands therein mentioned; to have and to hold the said lands of Bennekerry to the said trustees, their heirs and assigns, to the use of the said George John Nixon, his heirs and assigns, until the marriage then contemplated, and after the solemnization thereof to the use of George John Nixon for life, and after his death to the use of Emily Plant for her life, and after the death of the survivor to the use of the first and other sons of the marriage severally and successively, and the heirs male of their respective bodies; and in default of such issue as follows:—"And if there shall be only one daughter of the said George John Nixon lawfully begotten on the body of the said Emily Plant, to the use of such only daughter and her assigns, and if more than one such daughter, to the use of all such daughters and the heirs of their respective bodies in equal shares as tenants in common; and if any one or more of the said daughters shall die without issue, then as well as to the original share or shares of the daughter or daughters so dying as to the share or shares that shall have survived or accrued to such daughter or daughters, or to the heirs of her or their bodies or respective bodies to the use of the others or other of the said daughters and the heirs of their or her respective bodies or body, and if more than one, in equal shares; and in default of such issue as aforesaid, to the use of the said Bartholomew Boyd Elliott Nixon and his heirs, and in case the said Bartholomew Boyd Elliott Nixon shall die before the survivor of the said George John Nixon and

Emily Plant, to the use of the said George John Nixon and the heirs of his body."

The settlement contained a covenant that the said George John Nixon and his heirs and all persons lawfully or equitably claiming any estate or interest in the premises through or in trust for him should at all times at the cost of the estate thereby settled do and execute all such acts and assurances for further or better assuring the premises "to the several uses and in manner aforesaid" as the said Bartholomew Boyd Elliott Nixon and the said James Albert Plant or any person interested in the premises should reasonably require. The marriage between the said George J. Nixon and Emily Plant was duly solemnized, and there was issue thereof two children only, namely, Thomas C. Nixon and the defendant Mary Ellen Earl. George J. Nixon died on the 24th May, 1868; his widow died on the 25th December, 1913, and Thomas C. Nixon died on the 2nd May, 1918, without issue and without having executed any disentailing assurance as to the said lands of Bennekerry.

Bartholomew B. E. Nixon survived the said George J. Nixon and his widow, Emily Nixon, and died on the 14th January, 1917, leaving the defendant Edith Nixon his only child and heiress-at-law.

*J. H. Pigot K.C.* (*J. O'Byrne* with him), for the plaintiffs.

*S. L. Brown K.C.*, and *Chadwick*, for the defendant, Mary Ellen Earl.

On the true construction of the settlement Mrs. Earl is entitled to an estate tail. The words of limitation contained in the clause, "to the use of all such daughters and the heirs of their respective bodies in equal shares as tenants in common," must relate back to the limitation to an only daughter, and create an estate tail in her case as in the case of several daughters: *Gally* v. *Barrington* (1). If this be so, the deed requires no rectification; but, in any case, the intention of the deed is so clear that it should be construed as rectified, if rectification be necessary. This is a marriage settlement, and it must have been intended to make provision for the issue of the marriage: *FitzGerald* v. *FitzGerald*(2); *Stinson's Estate*(3). Estates

(1) 2 Bing. 387. (2) [1902] 1 I. R. 477. (3) [1910] 1 I. R. 47.

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tail are otherwise given throughout to the issue of the marriage, and there could be no reason for restricting the estate of an only daughter to a life estate. It would be absurd that an only daughter should take a life estate only, whilst two daughters could take estates tail with cross remainders in default of issue. The limitation over "in default of such issue," which must include default of issue of an only daughter, shows that the settlor believed the former limitations to have been complete: *Stinson's Estate* (1); *Rodgers* v. *Houston* (2); *In re Davis* (3).

*Hugh Kennedy*, for the defendant, Edith Nixon:—

From the time of its statement in the first section of Littleton on Tenures to its most recent recognition in terms of emphasis by Sargant J., in *Re Moncton's Settlement* (4), the rule is unshaken that a legal limitation to *A* simpliciter without the addition of his heirs gives *A* no more than an estate for his life. There is no question here of equitable estates, and intention cannot be invoked to expand the legal estate expressly limited. Were intention admissible on the basis of a notional rectification, admittedly there is no evidence in existence outside the deed itself and, apart from speculation, there is no evidence within the deed. On the contrary, the fact that the draftsman limited an unquestioned life estate to the wife in the settlement in words identical with those before the Court, rebuts the inference of any such intention. The gift over is "in default of such issue," that is, the issue before mentioned, namely, issue of daughters. This is a well-recognized and well-understood form of limiting a remainder on estates tail handed on from the older books to the latest edition of Key and Elphinstone's Precedents.

O'CONNOR M.R.:—

The summons in this matter was taken out for the purpose of determining what estate was taken by Mary Ellen Earl, under an indenture of settlement, dated 27th February, 1865. She maintains that she became tenant in tail of the lands thereby settled, while Edith Nixon, as the heiress-at-law of Bartholomew Boyd Elliott

(1) [1910] 1 I. R. 47.
(2) [1909] 1 I. R. 319.
(3) [1912] 1 I. R. 516.
(4) [1913] 2 Ch. 636.

Nixon, who became entitled as tenant in fee in remainder expectant in the events which happened on the determination of the estate of Mary Ellen Earl, maintains that the latter took an estate for life only.

The question turns on the wording of the settlement. This settlement was made on the marriage of George John Nixon with Emily Plant. [His Lordship stated the terms of the deed as above set out, and continued.] The events which have happened are: The husband and wife—the tenants for life—are dead. There was one son of the marriage and he died without male issue, and without having barred his estate in tail male. There was only one daughter of the marriage—the defendant, Mary Ellen Earl. Bartholomew Boyd survived the husband and wife, and Edith Nixon is his heiress-at-law. The question is—Did Mary Ellen Earl take an estate for life or an estate in tail?

Looking back at the limitations which I have stated, it will be observed that the remainder next after the estates in tail male given to the sons is limited in these words: "and if there shall be only one daughter . . . to the use of such only daughter and her assigns, and if more than one such daughter, to the use of all such daughters and the heirs of their respective bodies," etc. No conveyancer can read this without being struck by the absurdity of giving an only daughter an estate for life (if such was the intention, where, if there happened to be more daughters than one, they were to be tenants in tail. This absurdity is made still more glaring by the consideration that, if Mary Ellen Giltrap, the sole daughter, had a twin sister born who survived only for a few hours, they would be tenants in common in tail with cross-remainders which would have given Mary Ellen an estate tail in the entire lands. It is manifest that there was some clumsiness in framing the limitation in favour of the female issue, which resulted, if the deed is to be subject to a rigid construction, in giving the sole daughter of the marriage an estate for life only. But surely the deed is capable of another construction. Strike out altogether the clause—"and if there shall be only one daughter of the said George Nixon lawfully begotten on the body of the said Emily Plant, to the use of such only daughter and her assigns"—and then there is the limitation to all daughters in

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tail with cross-remainders. This by itself would, in my opinion, give an estate tail to an only daughter constituting the class not merely by implication, but because a gift to a class necessarily involves a gift to the class whether it consists of many persons or only one person. There would then be independently of the original limitation to only one daughter and her assigns another limitation which would of its own force give her an estate tail.

In cases of this kind where the intention is manifest, the courts have gone far to prevent it from being defeated; and if sufficient words of limitation have been found in any part of a series of limitations which it was possible to connect with the gift in question they were so read in order to support the intention. The leading case of the kind in this country is *Denny's Estate* (1). There the grant was to the use of the first son of the body of R. D. Denny not being entitled to certain estates or until he should become so entitled; remainder to the use of the second, third, and every son in succession of R. D. Denny until he should become so entitled and the heirs male of their bodies not being so entitled. It is to be observed that the limitation to the first son is without the addition of words of inheritance—heirs of the body—while the limitation to the second, third, and other sons is with those words. On a strict reading the first son would only have had an estate for life, but the Court of Appeal held that heirs of the body might be read in connexion with the limitation to the first son. Lord O'Hagan C. dealt with the case thus (page 438):—"Now, before we come to consider the exact phraseology of the clauses, we must note how startling it is to find not only that the ordinary course of settlements, giving to the eldest son as good an estate as that given to the younger, must, if the eldest was to be only a life tenant, here have been departed from without any apparent reason by the settlor, but also that it was abandoned in circumstances making adherence to it eminently probable and natural. . . . There is no indication of any design to make that settlement enure to the benefit of the younger sons of the grandsons so favoured to the detriment of their eldest brothers; and one would expect strong and clear language to justify the construction securing to them that benefit at the expense of him

(1) I. R. 8 Eq. 427.

and his children. Of course, upon the authorities, mere intention on the part of a settlor will not be sufficient to make a limitation or vest an estate. There must be apt words of force for that purpose according to legal principles to make the one and vest the other. But if we see anything equivocal or contradictory in the terms of a deed, we are at liberty to regard the whole of it, 'looking before and after,' and to take into account the indication of intention as giving a guiding light for the true interpretation of those terms. Here, undoubtedly, the object and the consideration of the settlement tend to predispose the mind to adopt the construction of the appellant; and I have failed to find anything in the terms employed to render that construction impossible or very difficult. I do not see why according to the ordinary meaning of words and the ordinary connexion of the members of a sentence the words 'and to the heirs male of their bodies' may not be held to have the same relation to the first son as to the second and the third, or why we should say that in this continuous clause we discover such a dividing gap as to make the estate given to the first contrary to the experience of conveyances to reason and probability so different from that given to the second and third." Then he goes on to comment on the slovenly character of the conveyance, and he proceeds to show that by inserting the conjunction "and" in one place and reading a part as a parenthesis, the last limitation might be connected with the first so as to give the first taker an estate tail.

This is an example of the length the Court was prepared to go in order to carry out the intention of a deed. Lord Justice Christian in a similar way dissects and puts together the limitations in the deed in order to find what he describes as the only meaning which it was permissible to ascribe to them, and which flowed from the simple natural grammatical construction of the language used. Now, with all due respect, it was not a simple grammatical construction, but it was the only construction which it was permissible to give in order to carry out the plain intention of the deed and to avoid an interpretation "which would attribute to the parties an intention utterly capricious, insensible, and absurd," as it is described by the learned Lord Justice.

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Are not the descriptions of the conveyance and the observations on the manifest evidence of intention forcibly applicable to the settlement before us? What could be more capricious, insensible, and absurd than the limitation of a life estate to an only daughter and the limitation of an estate tail to several daughters, with cross-remainders between them, which would bring the entire estate to a sole survivor's daughter? Is not this a case for resorting to every device of punctuation and parenthetical reading for connecting the ultimate words of limitation with the gift of the first estate? We have the words and "the heirs of their or her respective bodies," which, notwithstanding the obscurity raised by clumsiness in handiwork, may be attributed in the mind of the conveyancer to the first limitation to a sole daughter.

Counsel for the defendant Mary Ellen Earl, the sole daughter of the marriage, relied strongly and rightly on the case of *Gally* v. *Barrington* (1). There the limitation by deed of settlement was to John Gally for life, remainder to the use of the first son of John Gally by his intended wife, and for default of such issue to the use of the second, third, and other sons of the body of John Gally by the intended wife, severally and successively as they should be in seniority of age, and of the several heirs male of their respective bodies. It is to be observed that there were no words of limitation in immediate connexion with the first gift, and the "heirs male of their respective bodies" refers strictly only to the younger sons; but it was held by the Vice-Chancellor, who had sent a case to the Common Pleas, that the eldest son took an estate tail.

In *Doe, deceased, Willis* v. *Martin* (2), the limitations in a marriage settlement were to the use of all and every the child or children equally share and share alike, to hold the same as tenants in common and not as joint tenants, and if but one child, then to such only child, his or her heirs or assigns for ever. Now here, on the ordinary grammatical construction, "his or her heirs or assigns" is referable to the only child and to none other. It is only to the mind of the conveyancer that the necessity for more extended reference would occur. He would see the absurdity of giving

(1) 2 Bing. 387. (2) 4 T. R. 39.

only life estates to children when more than one and an absolute estate to an only child. He would, therefore, seek for some device by which he could connect heirs and assigns with the children taking as tenants in common, so as to give them estate in fee-simple. In the case I am referring to the parenthetical device was resorted to, and the words of limitation were in this way linked up to the tenancy in common.

I do not think that the present case requires any greater straining of construction or the exercise of any greater ingenuity in connecting the words of limitation with the gift to the only daughter than was exhibited in the cases I have cited. They appear to me to afford ample justification for holding in the present case that the sole daughter of the marriage took an estate tail—the only construction which carries out the manifest intention of the deed. But there is more in the case than this. Even if at law the conveyance failed to give an estate tail to the sole daughter of the marriage, there is a good estate tail in equity. The ante-nuptial contract which was recited was to convey the lands upon and for the trusts, interests, and purposes thereinafter expressed and declared. Now the intent is absolutely clear, unless we are to impute a "capricious, insensible, absurd intention" to the settlor without any evidence of such; and if the conveyance fails at law to carry out the intention, there is the covenant for further assurance, which it is the right of the parties who are purchasers under the deed, as all the children are, to enforce the covenant, and so get a conveyance which at law will give a legal estate in accordance with the intention. I have all the parties before me who would be necessary parties to an action upon the covenant, and, therefore, I can give effect to it.

I answer the question put by deciding that the defendant Mary Ellen Earl is entitled to an estate in tail. Costs of all parties to be costs in the matter, and to be paid out of the lands.

Solicitor for the plaintiffs: *P. J. Byrne.*

Solicitors for Mary Ellen Earl: *Harris & Greene.*

Solicitor for the defendant Edith Nixon: *T. F. Monks.*

R. R.

*Ross J.*
1918.
Nov. 25, 26, 27, 28, 29.
Dec. 19.

# THE EDUCATIONAL COMPANY OF IRELAND, Ltd., Plaintiffs; FALLON BROS., Ltd., and THEODORE GETZ, Defendants.

(1918. No. 3.)

*Copyright—Two books compiled for different publishers by the same author from the same materials, and with similar plan—Agreement not to publish a similar work—Restraint of trade—Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 8, 35.

The defendant G. wrote a book for school use, the copyright in which he assigned to the plaintiffs, and agreed not to publish any similar work during the subsistence of the agreement. He subsequently wrote for the defendants F. Bros. a book on the same lines, adopting the same system, repeating the same kind of lessons, intended practically for the same class of pupils, and F. Bros. published it at a like low price.

*Held*, that the author in the subsequent work had made an unfair use of the materials used in the preparation of the former work, and that consequently the publication of the second book was an infringement of the plaintiffs' copyright in the first; that the agreement was not in unreasonable restraint of trade; and that the defendants F. Bros. should be restrained by injunction from publishing the second book. *Barfield* v. *Nicholson* (2 Sim. & S. 1) followed.

Trial of Action.

The facts material to the present report are as follows:—

The plaintiffs are a publishing company, carrying on an extensive business in Ireland. They brought this action against Messrs. Fallon, a similar Irish company, and Dr. Theodore Getz, a professor of languages and an author.

Against the first-mentioned defendants they claimed an injunction to restrain them from further printing and publishing a work called "The Junior French Book," in so far as the said book infringed the copyright of the plaintiffs in a book known as "Getz's Practical French Course." Against Professor Getz they

claimed damages for breach of an agreement, dated 4th January, 1916, whereby the defendant agreed to write the last-mentioned book and to sell and assign all his copyright therein to the plaintiffs, and not to publish a copy of the said book or any similar work during the subsistence of the said agreement without the consent of the plaintiffs.

The agreement mentioned was executed by the plaintiff company and Professor Getz on the 4th January, 1916.

In the second clause, Professor Getz agreed to write, edit, and complete a work to be entitled "The Educational French Grammar and Reader," suitable for Intermediate Schools; and to prepare the same for the press, with all usual and necessary tables and indexes, according to the present state of knowledge respecting the same by 30th January, 1916, and to correct the proof-sheets, and to sell and assign all his copyright and interest therein to the publishers and their assigns for the sum of £105. In the third clause it was agreed that, subject to the provisions of the Copyright Act, 1911, the publishers should have the sole right of printing and publishing the said work to the exclusion of all other persons during the existence of the legal term of copyright, with full right to transfer the right to print and publish to other persons or person, provided always they bind those persons to observe their obligations as towards the said author; and said publishers should have the sole control of the publication and sale of the said work, and should have it in their absolute discretion to print or refrain from printing and publishing successive additions thereof, as they should think fit. Clauses 4, 5, and 6 are immaterial.

Clause 7 was as follows:—"During the subsistence of this agreement, the author shall not publish or cause to be published any copy or any abridgment or translation of the said work or any similar work without permission of the said publishers."

On 27th November, 1916, the author duly assigned the copyright to the plaintiffs, who, having paid the £105, printed and published 3000 copies of the work called "Getz's Practical French Course," called hereinafter the Blue Book. On the 21st February, 1917, the author proceeded to sign an agreement with the defendants, the Messrs. Fallon, undertaking to compile a French grammar on the lines planned out by him and submitted to the

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Rev. Dr. Corcoran, S.J., Editor of Fallon's Intermediate School Series, for a sum of £50; and for a further sum of £12 10*s.* a second edition, and for a further sum of £12 10s. a third edition. This book, called the "Junior French Book," by Theodore Getz, has been published by the defendants, the Messrs. Fallon, and extensively sold. It is referred to hereinafter as the Red Book, and was held by His Lordship to be a similar work to the Blue Book.

*S. L. Brown K.C.*, *Herbert Wilson K.C.*, and *Lardner*, for the plaintiffs:—

Professor Getz's agreement was valid and binding on him. There is no such thing as restraint of trade where copyright is concerned: *Morris* v. *Colman* (1); *Ainsworth* v. *Bentley* (2). This particular agreement is not "oppressive": see Lord Atkinson's judgment in *Morris* v. *Saxelby* (3). As against Messrs. Fallon Bros., it is immaterial whether they had notice of Professor Getz's agreement or not: *Barfield* v. *Nicholson* (4); Copinger on Copyright (5th ed.), page 560; the Copyright Act, 1911, sect. 8. There can be copyright in an arrangement: Copinger, page 54; see also page 157. [They also cited *Moffatt and Paige* v. *Gill* (5).]

*Henry K.C.*, *Carrigan K.C.*, and *Finlay*, for the defendants, Messrs. Fallon:—

There is no copyright in a mere arrangement: Copinger on Copyright, 5th ed., page 55; *Leslie* v. *Young* (6); *Hollinrake* v. *Truswell* (7); *Pike* v. *Nicholas* (8). Messrs. Fallon entrusted the production of their book to the editor of their series, who knew nothing of the earlier book.

*Wylie K.C.*, and *Murnaghan*, for Theodore Getz:—

On the construction of the agreement we submit that it was binding upon the defendant Getz only during the period until the first book was produced. If it has a wider operation it must extend during the whole period of copyright and is in restraint of trade. The agreement will interfere with the means of livelihood of Professor Getz. We rely upon the case of *Morris* v. *Saxelby* (3)

(1) 18 Ves. 437.
(2) 14 W. R. 630.
(3) [1916] 1 A. C. 688, at p. 698.
(4) 2 Sim. & S. 1.
(5) 84 L. T. 452; 86 L. T. 465.
(6) [1894] A. C. 335.
(7) [1894] 3 Ch. 420.
(8) 39 L. J. Ch. 435.

in the House of Lords. The public have an interest against the enforcement of such an agreement. The only claim against Professor Getz is for damages for breach of the agreement.

*Cur. adv. vult.*

[His Lordship, having stated the facts as above set out, proceeded as follows :—]

The plaintiffs contend that the Red Book is a similar work to the Blue Book, written on the same lines, adopting the same system, repeating the same kind of lessons, intended practically for the same class of pupils, at a like low price, and in short designed and calculated to supersede the plaintiffs' book altogether. The defendants contend that the Red Book is essentially different from the Blue Book ; that it is intended to be used with less help from the teacher ; that it is more graduated, more explanatory in elementary detail, and compiled independently from sources open to all. I am satisfied as a fact that the words "any similar book" were in the agreement, though the fact was not present to the mind of Professor Getz afterwards. The first question that arises for determination is what is the meaning of the words "during the subsistence of this agreement the author shall not publish any similar work." It is contended for the defendant, Professor Getz, that this means that he is never to publish a similar work at any time or in any place, and consequently that it is unreasonable, and that this term of the agreement is inoperative in law as a restraint on trade. I think, however, that this unrestricted construction of the term is not required. The clause is a dependent clause and is to be read with the third clause, and the agreement is to be deemed to subsist during the legal term of the copyright. This would certainly not be an unreasonable restriction, and would bind the contracting party. But even assuming the widest construction, does the general law relative to restraints of trade and the exceptions thereto apply at all to cases where an author assigns his copyright and agrees not to write similar work for another ?

In *Morris* v. *Colman* (1), Lord Eldon enforced a clause restraining the defendant from writing for theatres other than that he

(1) 18 Ves. 437.

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had exclusively contracted to write for. Again, in *Ainsworth* v. *Bentley* (1), Vice-Chancellor Page-Wood held the defendants bound by an agreement not to publish a periodical of a like nature to that sold by them to the plaintiff. "It had never been decided," says Page-Wood, V.-C., "that a person could not be compelled to keep an undertaking not to sell or deal in a particular article of trade. He may bind himself never to deal in a particular article again."

Apart from the question arising in the case where an author assigns his copyright and agrees not to write a similar work, is there anything in this case in the nature of an unreasonable restriction? In the case of *Morris* v. *Saxelby* (2), so strongly pressed on the part of the defendants, the circumstances are not analogous, and the principle laid down in no way conflicts with the words of Page-Wood, V.-C., which I have just quoted.

The public has an interest in freedom of trade; it has also an interest in maintaining the sanctity of contract. All interference in restraint of trade is prima facie contrary to public policy and void; but exceptions may be justified by the special circumstances of a particular case. The restraint must be reasonable, and it must not be wider than is adequate for the protection of the party in whose favour it is enforced. In the term "reasonable" I think must be included that it is not to be oppressive, that is to say, it must not deprive a man of the means of supporting himself and his family. Applying this test, was there anything unreasonable or oppressive in prohibiting Professor Getz from publishing a similar work? He was free to write a more advanced work or a more elementary work; but he was prohibited from writing a similar book that would supersede and render valueless the property he had assigned to the plaintiffs. I think there was nothing unreasonable in the plaintiff's acquiring the protection which was necessary to enable them to utilize the property they had bought.

If I am right in this, that is the end of the case, as against Professor Getz, because nobody can contend that the Red Book is not a similar work to the Blue. In answer to a question from me, he admitted frankly that if the term in the agreement prohibiting a similar work had been present to his mind, he would not have

(1) 14 W. R. 630. (2) [1916] 1 A. C. 688.

written the Red Book in its present form. He has manifestly broken a term of his agreement, and I am of opinion that this term is operative and enforceable in law.

I go on now to consider the question of copyright simpliciter. It has not been contended in the course of the argument that such a book as the Blue Book may not be the subject of copyright, but the evidence of the experts called on behalf of the defendants is pointed to the conclusion that the Blue Book, in the circumstances of the case, cannot be the subject of copyright at all. In this connexion we have only to consider the Copyright Act of 1911.

There are three sections with which we are concerned, viz. the first, the eighth, and the thirty-fifth. Turning to the thirty-fifth section we find that literary work includes compilation. A compilation is something derived from materials common to all.

I do not propose to go through the numerous cases that have been cited, because I think the results are stated with great precision in two paragraphs of Copinger on Copyright, at p. 54: "Copyright may therefore be claimed by an author of a book, who has taken existing materials from sources common to all writers, and arranged and combined them in a new form and given them an application unknown before. For in making the selection, arrangement, and compilation he has exercised skill and discretion, and in producing something thereby that is new and useful, he is entitled to the exclusive enjoyment of his production. Books made and compiled in this manner are therefore the proper subjects of copyright; and the author of such a work has as much right in his plan, arrangement, and combination of the materials collected and presented as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old materials employed in such a combination for a different purpose."

We find very good examples illustrating what I have quoted in the Indian case dealing with Palgrave's Golden Treasury, and in the case of *Mason* v. *Murray* (1), dealing with a publication of Gray's poems; and again, in *Leslie* v. *Young* (2), where copyright

(1) Cited 1 East, 360.

(2) [1894] A. C. 335.

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was held to exist in a portion of a railway guide descriptive of certain circular tours, which, though taken from official tables, was condensed and arranged. Again, at page 55 of Copinger we find the following:—"Protection is not given to the component parts of a compilation independently of their arrangement and combination. Of the component parts the compiler is not the author, and he could not acquire an exclusive right to that which is common to all, neither can the arrangement and combination apart from the materials arranged and combined be the subject of protection. The copyright vests in the materials as arranged and combined not in the form and substance apart the one from the other, but in the union of the two."

The test of the matter is whether the author of the later work has made an unfair use of the prior work. It is perfectly fair to refer to the prior work for the purpose of ascertaining if he has omitted anything.

There may be much in the earlier work to suggest how various topics may be treated, but he must not directly or colourably appropriate or annex the result of the first author's skill and labour as expressed in the earlier work.

When the author of the second book is the author of the first it is against right that he should be allowed to produce a work that substantially reproduces everything of value in the earlier work, and is calculated to supersede it and drive it out of the market.

It is no defence to say that the words used are not the same. Dissimilarities of words are often introduced on purpose. It is not a defence to say that the same things in one book do not appear in the same parts of the other. Nor is it a defence to say that a new feature such as the index is introduced in the later work, or that it is better graduated, that it begins lower down and goes higher up. We must consider all the circumstances of the case before we can decide whether the rights of the publishers of the Blue Book have been invaded by the publication of the Red.

[His Lordship, having analysed the evidence, stated that the conclusions at which he had arrived were:—1. That Professor Getz has violated the express terms of his agreement by producing a similar work. 2. That after assigning his copyright in the Blue

Book for value he wrote a book for a rival company which infringed that copyright.] His Lordship then proceeded—

Further the law implies a term in such a contract that the assignor will not do anything that will render what he has conveyed valueless and futile. If an author having assigned his work and the copyright in the work were to be allowed to go to a rival firm and publish through them a work that must supersede and put out of the market the earlier work, employing the same method, arrangement, and material, all the protection afforded by the Statute would be a mockery.

I now go on to consider how the Messrs. Fallon are affected, and this brings me at once to the consideration of the case of *Barfield* v. *Nicholson* (1). The defendant Nicholson wrote a book called the Agricultural Dictionary in the year 1821, and sold his copyright in the work to the plaintiff, and covenanted that he would not write or publish any other kind of publication which might be detrimental to its sale. In July, 1823, Nicholson prepared a work called the Practical Builder, which contained in substance the greatest part of the information comprised in the Agricultural Dictionary, and also introduced into it many of the designs and plans of the earlier work.

Sir John Leach V.-C. granted an injunction on the application of the plaintiff. At a later period the Vice-Chancellor dissolved the injunction as against the publishers pending a trial at law which the plaintiff proposed to bring, the Court being of opinion that the matter complained of as having been reproduced in the later work was not the property of the plaintiff. The plaintiff appealed to the Lord Chancellor, Lord Eldon, and after several days' argument, which was conducted by some of the greatest lawyers of the time, he granted an injunction restraining the publisher from publishing the later work in the name of the author, and from employing the author in writing any part of the letterpress, or designing any of the plates until the hearing of the cause. Although the case is one of an interlocutory injunction, it is of the first importance and of the highest authority.

It is plain the whole facts were before the Court on the hearing of the motion in the Court below to dissolve the injunction,

(1) 2 Sim. & Stuart, 1.

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and in the Court of the Lord Chancellor, where the appeal was heard at great length. The circumstances are analogous to the facts of this case, and what is of great moment is this: that the author of both works is, as here, the same person; and I have no doubt but that Lord Eldon was of opinion that the author had made an undue use of parts of the first work for the purposes of the second.

The case has never, so far as I know, been questioned, and the effect of it is stated in Copinger, p. 560, in the following terms:—"So when an author sells the copyright of a work published under his own name, and covenants with the purchaser not to publish any other work to prejudice the sale of it, it seems that another publisher, who has no notice of this covenant, may be restrained from publishing a work subsequently purchased by him from the same author, and published under his name on the same subject but under a different title, and though there has been no piracy of the first book."

Sect. 8 of the Copyright Act of 1911 seems to be a recognition of the authority of this case. An innocent infringer may be restrained by injunction, but is exempted from liability to pay damages "if he proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright existed in the work."

For the Messrs. Fallon it has been contended that it would be unreasonable that a publisher should be restrained merely on the ground of an agreement between the author and the first publisher of which the defendants knew nothing. But surely in this case they were put on inquiry. Surely they had reasonable ground for suspicion; they must have known that it was customary in the trade to have a written agreement. Why did they not ask Professor Getz to produce the written agreement? They knew that Professor Getz had written a French Reader and Grammar and Composition Book for the plaintiffs. Before they published another French Reader and Grammar and Composition Book they ought to have put the Blue Book into the skilled hands of Dr. Corcoran, who was not aware of it till after the plaintiffs complained of the infringement.

A man who abstains from inquiry when inquiry ought to be

made cannot be heard to say so and rely on his ignorance. The plaintiffs have been seriously injured.

The Blue Book is certainly a remarkably good book, and at so low a price might reasonably be expected to have a large sale when it reached a second edition. The first edition nearly always results in loss; and if the Red Book remains in the market, there will never be a second edition of the Blue Book at all.

The plaintiffs have established their case to my complete satisfaction, and I must make the usual decree against both the defendants.

Solicitors for the plaintiffs: *Hunter & Burland.*
Solicitor for the defendants: *Daniel Purcell.*

T. C. T.

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## IN RE MARTIN.
## MARTIN AND SETTLED LAND ACT, 1882.



(1918. No. 893.)

*Settled land—Tenant for life—Will—Gift to widow during widowhood for benefit of herself and children—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7, *and s.* 58, *sub-s.* 1 (vi).

A testator gave the lands of F. and personal property to trustees on trust after payment of debts, etc., to permit and suffer his wife G. to manage the residue of the same, and to receive the interest, dividends, and annual produce thereof "for her life, or until she shall marry again for the benefit of herself and our children as she may think fit." A full life interest in part of the lands was by the effect of the will and two codicils thereto secured to her on her re-marriage.

*Held* (following *In re Pollock,* [1906] 1 Ch. 146), that G. had the powers of a tenant for life as regards the lands of F. under sect. 58, sub-s. 1 (vi), of the Settled Land Act, 1882, subject in effect to an equitable incumbrance on her interest in favour of the children.

SUMMONS.

Richard William Martin of Flaxfort, in the county of Cork, by his will dated the 24th October, 1908, appointed Abraham Hague Roberts and William Henning Corker his trustees and

*Pim J.* 1918.

*In re* MARTIN.

executors, and devised and bequeathed his lands of Flaxfort with the house thereon and the furniture and effects therein with other property to his trustees in trust after payment out of his moneys and investments, and if these should be insufficient out of his other property, of his funeral and testamentary expenses and debts, "to permit and suffer my wife Gladys Martin to manage the residue of same, and to receive the interest, dividends, and annual produce thereof for her life, or until she shall marry again, for the benefit of herself and our children as she may think fit"; and in the event of his wife marrying again the testator devised the dwelling-house of Flaxfort together with the yard and gardens near the house and the avenue leading thereto and the furniture and effects therein in trust for his wife as a home during her life, and in such event he devised the lands of Flaxfort (except those devised in trust for his wife) with other property on certain trusts in favour of his children; and after the decease of his wife or her not requiring the house yard gardens and avenue as a home, he devised the same and the furniture and effects therein in trust for his elder daughter.

The testator made two codicils to his will, by the second of which he directed that certain fields and buildings comprised in the estate of Flaxfort should be added to the premises devised in trust for his wife. He died on the 2nd June, 1916, leaving his widow and two daughters (both infants) surviving. The lands of Flaxfort contained in all about 146 acres, and were freehold registered land.

The testator's widow, being unable to farm the lands to advantage, desired to sell the portions containing 119 acres, in which her interest would cease on her marrying again, and was advised that these portions could be sold without depreciating the value of the remainder, namely, the dwelling-house and lands (containing about 27 acres), which were secured to her during her life. She was also advised that it was doubtful whether on the true construction of the will the trustees were trustees of the settlement, within the meaning of the Settled Land Acts.

The testator's widow accordingly applied for an order declaring that she had the powers of a tenant for life over the estate and lands of Flaxfort, and that if necessary A. H.

Roberts and W. H. Corker should be appointed trustees of the settlement made by the will and codicils for the purposes of the Settled Land Acts.

*M. G. Longfield*, for the applicant:—

The testator's widow has under sect. 58, sub-s. 1 (vi), of the Settled Land Act, 1882, the powers of a tenant for life over the portions of the lands of Flaxfort which it is proposed to sell, and is tenant for life of the dwelling-house and the portions of the lands which are reserved to her in the event of her marrying again. The effect of the will is to create an equitable charge on the beneficial estate of the applicant in favour of her children for their maintenance and benefit, as in *In re Theaker's Settled Estates* (1) (mentioned in Wolstenholme's Conveyancing and Settled Land Acts, 9th ed., page 330). See also *In re Pollock* (2), where the words were very similar to those in this testator's will. In *Williams* v. *Jenkins* (3) there was a similar charge for the education of children. Such a charge does not deprive the applicant of her statutory powers having regard to sect. 2, sub-s. 7, of the Settled Land Act, 1882.

PIM J.:—

I think the present case cannot be distinguished in principle from *In re Pollock* (2), and that the applicant is entitled to an order declaring that she has under the will and codicils the powers of a tenant for life over the estate and lands of Flaxfort, and appointing Messrs. A. H. Roberts and W. H. Corker trustees for the purposes of the Settled Land Acts, 1882 to 1890, of the settlement made by the wills and codicils.

Solicitors for the applicant: *Corker & Levis.*

R. W. L.

(1) Unreported. (2) [1906] 1 Ch. 146. (3) [1893] 1 Ch. 700.

*Lord Chancellor.*
1918.

Dec. 9, 20.

## BUTLER, Deceased.
## DELAP *v.* BUTLER.

*Will—Estate in realty—Direction that land "be entailed and go to next heir"—Limitation executed or executory—Estate tail or estate for life.*

A testator left all his landed property, which included W., subject to certain reservations, to his eldest son, and directed "the lands of W. to be entailed and go to next heir, and not to be sold or otherwise disposed of."

*Held*, that the trust was executory, and that the lands were subject to the limitations of a strict settlement, under which the devisee took an estate for life, and not an estate in tail.

*Blackburn* v. *Stables* (2 V. & B. 367) not followed.

Originating Summons.

James Edward Butler, of Waterville, County Kerry, by his will left (inter alia) unto his eldest son, James Whitwell Butler, all the stock on his farm, furniture, and plate in his house, all his landed property, houses, &c., subject to certain reservations therein mentioned, and added the following direction :—"The lands of Waterville to be entailed and go to next heir, and not to be sold or otherwise disposed of." On the death of the testator a summons was taken out by William Joseph Delap and Mary Goyne Butler, as executors of the deceased and guardians of the fortunes of his six infant children, of whom James Whitwell Butler was one, against Mary P. Butler, one of the trustees of the will of the deceased, for the purpose of taking the opinion of the Court as to whether James Whitwell Butler took an estate tail or an estate for life in the lands of Waterville.

*Serjeant Matheson K.C.*, for the guardian of the fortune of the minor, James Whitwell Butler :—

The minor takes an estate tail in the lands of Waterville. First, this is not the case of an executory trust; there is no gift to trustees, no direction to settle the lands; there is in the early part of the will a direct devise to the minor of all the testator's landed property, which would give him the fee; and at the end of

the will comes "the lands of Waterville to be entailed and go to next heir, and not to be sold or otherwise disposed of." The latter words are an attempted restriction on alienation, and are void and must be rejected. The words "to be entailed and go to next heir" following a direct gift to a devisee are not sufficient to create an executory trust involving a strict settlement; they only mean that instead of taking absolutely he is to take as tenant in tail; it requires no further conveyance; the testator has expressed plainly in technical language his meaning. Secondly, even if it is an executory trust, it is not a trust to be carried out by a strict settlement making the minor only tenant for life. *Blackburn* v. *Stables* (1), before Sir W. Grant, is almost on all fours with this case. There there was a devise in trust for a son of the testator's nephew A at the age of twenty-one years, with alternative gifts if A had no son, and then followed "whoever should take, not to be put into possession until twenty-four years of age, nor the executors to give up their trust till a proper entail be made to the male heir by him." It was held to be an executory trust in tail for the only son of A, and not to be carried out by strict settlement. Sir W. Grant held that there was none of the clauses usually taken as indicating a strict settlement, and that the words must be taken in their legal acceptation, and he decreed a conveyance to the son of A in tail male. In *Lowry* v. *Lowry* (2) lands were devised to J. F. Lowry, "and entailed in him and his issue male." Sir Andrew Porter reviewed all the cases, and held that J. F. Lowry took an estate in tail male, there being nothing to indicate that a strict settlement was contemplated. *Jervoise* v. *Duke of Northumberland* (3) was relied on in that case, and will be relied on here, but is distinguishable. There copyhold estates were devised to "my son, R.W.G., to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother." The property having been sold in a suit for specific performance, the question arose as to the title of R.W.G. Sir Thomas Plumer held that R.W.G. took an estate in tail male, but on appeal Lord Eldon, though not actually reversing that opinion, thought that it was too doubtful to force the title on an unwilling purchaser.

(1) 2 V. & B. 367. (2) 13 L. R. Ir. 317. (3) 1 J. & W. 559.

*Lord Chancellor.* 1918.

DELAP v. BUTLER.

In that case the words are "to be entailed," not upon him, but "upon his male heirs," which negatived his having an estate tail; and there were other strong indications against the devisee's having an estate tail. At most, that is a case of Lord Eldon's doubt against Sir Thomas Plumer's clear opinion. These are the only cases that I know of where the direction was simply "to be entailed." Where the words "to be strictly entailed" are used, there are several cases showing that a strict settlement is implied, making the first taker only tenant for life: *Graves* v. *Hicks* (1); *Sealy* v. *Stawell* (2); but these cases have no application to this case, where such words are absent.

*Garrett W. Walker K.C.*, for the defendant:—

The clause to be interpreted providing for an entail is executory, and where a limitation is executory, the Court will carry it out, where an entail is directed, by giving the first taker a life estate only. An executory limitation is defined by Lord St. Leonards in *Egerton* v. *Earl Brownlow* (3) as one which contemplates some act yet to be done or which necessitates recourse to the Court to ascertain the testator's meaning—in short, the test is: has the testator acted as his own conveyancer? I rely on *Jervoise* v. *Duke of Northumberland* (4). [He also cited *Leonard* v. *Earl of Sussex* (5); *Lord Glenorchy* v. *Bosville* (6); and *Legg* v. *Goldwire* (7).] *Lowry* v. *Lowry* (8), cited by Serjeant Matheson, is in defendant's favour, because the language there used was technically appropriate to create an estate tail in the first taker, and was decided on the ground that the testator had acted as his own conveyancer. *Blackburn* v. *Stables* (9), also cited by Serjeant Matheson, is inconsistent with *Jervoise* v. *Duke of Northumberland* (4) and the subsequent authorities.

*Cur. adv. vult.*

(1) 11 Sim. 536.
(2) I. R. 2 Eq. 326.
(3) 4 H. L. C. 1, at p. 210.
(4) 1 J. & W. 559.
(5) 2 Vern. 526.
(6) Cas. t. Talbot, 4.
(7) 2 White & Tudor, L.C., 8th ed., 785.
(8) 13 L. R. Ir. 317.
(9) 2 V. & B. 367.

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DELAP v. BUTLER.

Dec. 20.

SIR JAMES CAMPBELL C.:—

James Edward Butler, of Waterville House, Waterville, Co. Kerry, by his will, made on the 6th June, 1901, provided as follows:—"I hereby give and bequeath unto my eldest son, James Whitwell, or failing him, my second son, John Herbert, all the stock on the farm, furniture and plate in the house, all my landed property, houses, &c., with the following reservations." The last of these reservations is in the following terms:—"The lands of Waterville to be entailed, and go to next heir, and not to be sold or otherwise disposed of."

The question that I have to decide is whether by these words in this last reservation the testator has declared a trust which executes itself, or whether the trust is executory in the sense that the Court has to make out from his words what his intention was, and to give effect to it accordingly. To put it in another way, has the testator been his own conveyancer, and are his words sufficient by themselves to confer an estate tail in the lands of Waterville upon James Whitwell Butler, or are they at least so ambiguous as to require to be construed by the Court, and do they upon their true construction indicate an intention that something remains to be done in order to give effect to his directions? In the former case James Whitwell Butler would directly become entitled to an estate tail in the lands; but in the latter it is contended that the limitations would have to be framed in strict settlement, and consequently that he would take an estate for his life only. In support of the former contention Serjeant Matheson, on behalf of the devisee, has relied upon the decisions in *Blackburn* v. *Stables* (1) and *Lowry* v. *Lowry* (2) as practically conclusive in his favour.

In *Blackburn* v. *Stables* (1) the testator devised the remainder of his real and personal estate to different persons upon certain contingencies, but with a direction that "on whomsoever such his disposition should take place, his will was that he should not be put in possession of any of his effects till the age of twenty-four, nor should his executors give up their trust till

(1) 2 V. & B. 367.

(2) 13 L. R. Ir. 317.

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a proper entail was made to the male heir by him." Sir W. Grant M.R. held that there was nothing in the context to show that the testator did not mean to use the words in their technical sense as words of limitation and not of purchase, and consequently that the person who succeeded to the property under the disposition in the will was entitled to have the conveyance made to him in tail male.

In *Lowry* v. *Lowry* (1) the words of the devise were as follows:—"I also bequeath to my son, John Fetherston Lowry, the townland of Dungorran, and entail it in him and his issue male." This seems to me to have been a case in which the testator was plainly his own conveyancer, and the Master of the Rolls was, therefore, quite right in deciding, as he did, that the devisee took a vested estate in tail male. In his judgment (at p. 324) he says:—"There is no reason for construing this devise as executory. The testator was his own conveyancer. There is no gift to a trustee; no direction that anything should be done. The testator does not ask any trustee or the Court to entail the lands. The words he uses are words of present gift: 'I entail it in him and his issue male.' It appears to me, therefore, that the case is free from the doubt expressed by Lord Eldon in the case of *Jervoise* v. *Duke of Northumberland* (2)." *Blackburn* v. *Stables* (3), upon the other hand, was a case in which the trust was clearly executory, and the testator plainly intended that some other authority should give effect to his direction to make a proper entail, so that it would seem to be a direct authority in favour of Serjeant Matheson's contention. At once I am confronted with the difficulty created by the decision of Lord Eldon in the familiar case of *Jervoise* v. *Duke of Northumberland* (2), in which the language of the trust very closely resembled that of the testator in the present case. The words in that case were, "To my son R. I leave all my estates at B., etc., to be entailed upon his male heirs." In a suit for a declaration of the rights of the parties Sir T. Plumer V.-C. had decreed that R. was entitled to an estate tail. The estate was afterwards settled on the marriage of R., and was purchased under a power of sale in the settlement; but the purchaser objected to the title, and

(1) 13 L. R. Ir. 317. (2) 1 J. & W. 559. (3) 2 V. & B. 367.

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was made defendant in a suit for the specific performance of the contract. Lord Eldon in declining to force a doubtful title in the purchaser plainly indicated his opinion to be that the trust was executory, and that the Court in giving effect to it would have decreed a strict settlement, giving R. an estate for life only. It is a remarkable fact in connexion with this case that no reference is made by Lord Eldon in his review of the authorities to the case of *Blackburn* v. *Stables* (1); but in Jarman on Wills, 5th edition, p. 1200, the author expresses the opinion that, in the light of *Jervoise* v. *Duke of Northumberland* (2), it would not be safe to treat *Blackburn* v. *Stables* (1) as a binding authority. In this apparent conflict of decision I consider that, for the purpose of construing the language of the devise in the present case, which so closely resembles that adopted by the testator in *Jervoise* v. *Duke of Northumberland* (2), I am bound, as Mr. Walker has argued, to give effect to any words in the context which indicate, or aid in determining, the intention of the testator. I do not ignore the distinction that has been taken in the cases between marriage articles in which, as distinguished from a will, the object is to provide for the issue of the marriage, who are for this purpose treated as purchasers, nor am I losing sight of the principle that where the testator plainly intended to give to the devisee an estate tail, a Court of equity should not curtail the nature or extent of his bounty; but I consider that where the language of the gift approaches so closely to the border-line as in the present case, I am driven in attempting to discover the intention of the testator to give effect to every word in the form of the gift which, in the language of Sir W. Grant in *Blackburn* v. *Stables* (1), would indicate "that the testator did not mean to use the words in their technical sense." I feel, therefore, that I must give effect to the argument of Mr. Walker, and hold that the testator by directing the lands "to be entailed" and "not to be sold or otherwise disposed of," contemplated a future settlement which would, so far as was legally possible, fetter alienation of Waterville, which plainly was the residence and home of the family. The words "not to be sold" must be discarded as repugnant to the estate conferred, but they are nevertheless available and powerful as

(1) 2 V. & B. 367. (2) 1 J. & W. 559.

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negativing an intention to confer a vested estate in tail male, which was capable of immediate alienation.

In *Leonard* v. *Earl of Sussex* (1), lands were devised to trustees for payment of debts and legacies, with a direction afterwards to settle what should remain unsold—one moiety to H. and the heirs of his body by a second wife, and the other moiety to F. and the heirs of his body, with remainders over; "taking special care in such settlement that it should never be in the power of either of the sons to dock the entail of either of their moieties." It was held that the sons must be made only tenants for life, because the estate was not executed but executory only, and the testatrix had declared her intention to be that her sons should not have it in their power to bar their children. Had the words in this will before me been "to be strictly entailed," I think it clear on the authorities that the devisee would only have taken an estate for his life: *Graves* v. *Hicks* (2); *Sealy* v. *Stawell* (3). Notwithstanding, therefore, the decision in *Blackburn* v. *Stables* (4), I am satisfied the weight of authority is in favour of limitations in strict settlement in all cases in which the trust is executory and the circumstances indicate an intention by the testator that the trust should be settled by some authority other than himself. In the present case, I must hold from the use of the words "to be entailed" that the trust was executory, and that the words "not to be sold or otherwise disposed of," indicate an intention to prevent alienation in so far as the law would permit. I therefore decide that the devisee does not get a vested estate in tail male, but that the lands are subject to the limitations of a strict settlement under which he will obtain an estate for his life. It is plainly a case in which both parties should have their costs out of the estate, and I shall order these costs to be taxed on the higher scale.

Solicitor for the plaintiffs and for the defendant: *A. and J. Robinson.*

T. C. T.

(1) 2 Vern. 526.
(2) 11 Sim. 536.
(3) I. R. 2 Eq. 326.
(4) 2 V. & B. 367.

## FROST *v.* THE KING.

*Barton J.*
1917.
April 13, 18, 20.

*Appeal.*
1917.
Nov. 8, 9, 12, 13.

1918.
Dec. 19.

*Petty Sessions Clerk — Office of — Disqualification of women — Inveterate usage — "Proper person" — Petty Sessions Act*, 1827 (7 & 8 *Geo.* 4, *c.* 67), *s.* 8; *Petty Sessions Act*, 1858 (21 & 22 *Vict. c.* 100), *s.* 7.

A woman by reason of her sex is disqualified from being appointed or acting as Clerk of Petty Sessions.

PETITION OF RIGHT.

The facts sufficiently appear in the judgment of Barton J.

*Healy K.C.*, *Comyn K.C.* (with them *Clery* and *James Comyn*), for the suppliant.

*Serjeant Matheson*, *D. J. O'Brien K.C.* (with them *Devitt*), for the Crown.

BARTON J.:— April 20.

This was an interesting case, and was rendered doubly so by the manner in which it was presented by Mr. Healy. The main question for decision is whether the petitioner is eligible, notwithstanding her sex, for the office of Petty Sessions clerk. The office corresponds to that of clerk of justices in England. The clerk of Petty Sessions is the recording officer of the proceedings in these local Courts of Summary Jurisdiction in much the same way as the registrars are of the Superior Courts. The office was created by a statute of 1827 (7 & 8 Geo. 4, c. 67), and its appointment is now regulated by a statute of 1858 (21 & 22 Vict. c. 100, s. 7). In the former statute the justices were authorized to appoint a fit and proper person to act as their clerk. In the latter statute the words are "some proper person to fill such office." "Person," prima facie, includes women, but in numerous statutes is limited to male persons by the context or subject-matter. In the many statutes referring to the office its holder is always referred to as "he" or "him." But words importing the masculine gender may include females, and since the Interpretation Acts, 1850 and 1889, prima facie do so, unless, inter alia, there

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is some repugnancy in the subject-matter, or in the common law, or constitutional law, or practice affecting it: *Nairn* v. *University of St. Andrews* (1); *Chorlton* v. *Lings* (2); *R.* v. *Crosthwaite* (3). The burden to show such a repugnancy lies, in my opinion, upon the Crown in this case. As the office was created in 1827, there could not be any previous common law or constitutional practice or principle affecting this particular office; but the question seems to me to be whether it does not belong to a class of offices connected with the public administration of civil and criminal justice to which women have by constitutional usage never been admitted, and whether it is not reasonably clear that, in view of that usage, Parliament cannot have intended in 1827 or 1858 to render women eligible for this office.

It has been laid down by the best constitutional authorities that while, as regards private rights, women are on the same level as men, they have no public functions. It is a familiar saying that "in the camp, at the council-board, on the bench, and in the jury-box there is no place for them" (see Maitland and Pollock, vol. i, p. 485). The recording officers of Courts of Justice are, in principle, not far removed from the bench and the jury-box, and, so far as researches in the present case have gone, there has been no place for women among them. In England the qualification section impliedly goes far towards expressly excluding them from the corresponding office.

The Irish Exchequer Chamber, in *R.* v. *Crosthwaite* (3), decided that women are not eligible to vote at elections under the Towns Improvement Act, and the judgment of the majority of the Court proceeded largely on the maxim quoted and applied by FitzGerald B., "Feminae non sunt capaces de publicis officiis." That view also predominated in the judgment of Willes J. in *Chorlton* v. *Lings* (2), the leading case on women's incapacity to vote at parliamentary elections. It was also adopted by Lord Esher in *Lady Sandhurst's Case* (4), and reiterated by him in *Miss Cobden's Case*, *De Souza* v. *Cobden* (5)—cases of incapacity of women on elected county

(1) [1909] A. C. 147, at pp. 161, 162, and 165.

(2) L.R. 4 C.P. 374, per Willes J., at p. 387.

(3) 17 I. C. L. R. 463, per FitzGerald B., at p. 474.

(4) 23 Q. B. D. 79.

(5) [1891] 1 Q. B. 687.

councils. In the latter case he said that, subject to certain well-recognized exceptions, "by the common law of England women are not in general deemed capable of exercising public functions." It is true that these were dicta, but they fell from an eminent judge. Lord Chief Baron Palles, in *R.* (*Whitley*) v. *Justices of Cork* (1), said of the office of Petty Sessions clerk: "This office is no doubt a public office, and it is a statutory office; but it is an office which is held during the pleasure of the justices and of the Lord Lieutenant. That is the term and duration of the office."

Counsel for the petitioner were challenged, in the course of the argument, to cite any case from the earliest times where the office of a recording officer of any Court of civil or criminal jurisdiction was held by a woman, and they were unable to do so, although such office was almost as old as the judicial system. For example, I find judges, advocates, "registers," and proctors bracketed together in 23 Henry 8, c. 19. The nearest cases which they could cite were the cases of Lord Hereford's daughter, who was constable of England by descent, and Anne, Countess of Pembroke, who was hereditary sheriff of Westmoreland, and, being a masterful lady, insisted on exercising her office and sitting beside the judges at the Westmoreland Assizes. But Willes J. has pointed out that these were ancient hereditary offices usually held by deputy. The clerk of Petty Sessions is prohibited by statute from acting by deputy, and however unsuitable any particular case might be for a woman to record, she would have to discharge her duty in respect of it.

Cases were cited of women having been appointed sextons: *Oliver* v. *Ingram* (2); overseers of the poor: *R.* v. *Stubbs* (3), and in recent times inspectors of factories, and even departmental commissioners. But no case was cited of any woman having acted as recording officer of a Court of civil or criminal jurisdiction. In *Bebb* v. *Law Society* (4) women have recently been held disqualified by "inveterate usage" from acting as solicitors or attorneys. The reason of the modern decisions disqualifying women from public offices has not been inferiority of intellect or discretion, which few people would now have the hardihood to allege. It has been

(1) 43 I. L. T. R. 133, at p. 134.
(2) 7 Mod. 263.
(3) 2 T. R. 395.
(4) [1914] 1 Ch. 286.

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rather rested upon considerations of decorum, and upon the unfitness of certain painful and exacting duties in relation to the finer qualities of women. Public opinion is more enlightened than formerly on the subject of women's employments. In cases of this kind, about which public opinion is so widely exercised, judges must be careful not to usurp the functions of Parliament. A judge, and especially a judge of first instance, is bound in duty not to go beyond the strict limits of what he conceives to be the law. It is not alleged that the holder of any office corresponding to this one has ever been a woman. That seems to me to amount to a usage no less inveterate than that which has existed in the kindred offices of judge, juror, and solicitor. I do not feel at liberty to break such thick ice. If it is to be done, it must be by a superior Court or by the Legislature. I do not think these statutes of 1827 and 1858 contemplated the eligibility of women.

The petition will be dismissed, but, as the petitioner was supporting the unanimous decision of the magistrates upon the construction of ambiguous words, I shall not make any order against her as to costs.

D. M. S.

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1917. Nov. 8, 9, 12, 13.

The suppliant appealed to the Court of Appeal.

*Healy K.C.*, *Comyn K.C.* (with them *Clery* and *James Comyn*), for the appellant.

*Serjeant Matheson*, *D. J. O'Brien K.C.* (with them *Devitt*), for the Crown.

*Cur. adv. vult.*

1918. Dec. 20.

MOLONY C.J. said:—Lord Shaudon—who since the hearing of this case has resigned the office of Lord Chancellor—has written a letter giving his decision, and it has been agreed between the parties that the letter shall be accepted as his judgment. I shall read the letter. Ronan L.J. will deliver his judgment next, and I shall then follow, as I was the junior member of the Court at the time of the argument..

Lord Shandon's letter is as follows:—

MY DEAR LORD JUSTICE,—

Mr. de Versan tells me that it is desired to give judgment in Frost's case, and has asked me to communicate to you the decision I had arrived at.

I did not retain the notes I made for my judgment, so that all I can do is to indicate my conclusions, as follows:—

1. That the only question we could decide, assuming that the petition lay, was whether the petitioner was by reason of sex disqualified from being elected petty sessions clerk.

2. As to disqualification by common law, Lord Esher's statement in *Beresford Hope* v. *Lady Sandhurst* (1), if binding, is clear.

3. The opinion was not essential for deciding the case. The other five judges put it, and I think rightly, on the statute.

4. The same view appears to me true of *Chorlton* v. *Lings* (2). I do not think that Mr. Justice Willes's judgment quite justifies the sweeping statement of the law apparently made by Lord Esher.

5. I accordingly think that we are not precluded by modern authority from holding that women are not disqualified by the common law from discharging all public functions.

6. I could not undertake at this time to review all the old cases; but the general conclusion I arrived at was this, that they do not bear out the sweeping statement of Lord Esher. We find a clear disqualification in respect of the purely judicial offices and the council board; but outside this generalization there is only obscurity.

7. I am disposed to find the exclusion of women from, at any rate, minor offices more in the practical circumstance that until recently the education of women did not fit them, than in any disqualification merely by reason of sex; once the education is supplied, we find women in our time occupying public posts.

8. When one finds a woman fully qualified for public duties, I for my part must be shown a clear rule of the common law or a statute to exclude her.

(1) 23 Q. B. D., at p. 95. (2) L. R. 4 C. P. 374.

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9. I am of opinion that, in considering a public office created by a modern statute, in order to disqualify we must find either (*a*) a clear generalization at common law, (*b*) an express decision, or (*c*) a necessary construction of the statute.

10. I do not find either (*a*) or (*b*) with regard to this office of petty sessions clerk. Do I find (*c*)? I do not think in a mere summary I could with any profit go into details, but I have come to the following conclusion:—

(*a*) I find nothing in the Petty Sessions Acts to indicate duties to be performed by the clerk which could not be well discharged by a woman.

(*b*) While I agree that the Interpretation Act cannot reverse the true construction of the statute in this matter, I think that the inconsistency must be very clear. I do not consider there is any conclusive reason in the Petty Sessions Acts for excluding women from the "persons" who may be appointed.

11. I do not think that the non-appointment of women in the past either under the present Acts or the repealed Acts ought to receive weight. Until quite recently it would have been difficult to find women fitted by education to fill even very humble offices; it is not so now. To this difficulty, coupled with prejudice, I attribute the non-appointment of women.

In the result, I am prepared to hold that the petitioner was entitled to a declaration in the terms of No. 1.

Sincerely yours,

SHANDON.

RONAN L.J.:—

The late Lord Chancellor's opinion is that the plaintiff is entitled to succeed in the present case. His letter is mainly directed to the question as to whether the plaintiff is disqualified at common law by reason of her sex.

There is, however, another question in the case, namely, whether under the statutes regulating the matter the office is confined to males. This is a very difficult question, but on minute examination of the statutes I have come to the conclusion that

the office is confined to males, and that on this ground the plaintiff must fail in the action. On the matter of the disqualification at common law my view is that this disqualification does not exist.

I proceed to state my reasons for arriving at these conclusions. As the Lord Chief Justice in his judgment intends to state the general facts of the case, I do not think it necessary to deal with them. This is a petition of right, praying, inter alia, for a declaration that the suppliant (a lady) is qualified, notwithstanding her sex, to hold the office of Petty Sessions clerk for the district of Sixmilebridge.

In paragraph 3 of the answer and plea, the Attorney-Genera submits that she is disqualified by her sex from holding the office. In paragraph 6 the Attorney-General submits that the relief claimed cannot in law be claimed by or granted on a petition of right. At the Bar, counsel for the Attorney-General withdrew this objection, and requested the Court to give a decision on the questions of law raised by paragraph 3. The Court have assented to this, but, it must be understood, give no opinion on the question raised by paragraph 6.

The question in the case is, whether a woman could be appointed in the year 1917 to the office of Petty Sessions clerk in a Petty Sessions district under the power to appoint given by the Act of 1858. The office is a statutory office. If it appears on the true construction of the statutes that it is confined to males, this will dispose of the case. I shall deal with this question of construction in the first instance. It involves the consideration of the effect of special and general interpretation clauses as to gender, and their application to the particular Acts dealing with the office in question. I have come to the conclusion that, taking the statutes as a whole, the office is confined to males, and I therefore differ from the opinion expressed by Lord Shandon. There are seven Acts dealing with the office.

These are the statutes specially dealing with the subject of this case:—1827 (the 7 & 8 Geo. 4, c. 67); 1836 (the 6 & 7 Wm. 4, c. 34); 1840 (the 3 & 4 Vict. c. 108) (Municipal Corporations (Ireland) Act, 1840); 1849 (the 12 & 13 Vict. c. 69; the 12 & 13 Vict. c. 70); 1851 (the 14 & 15 Vict. c. 93), Petty Sessions

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Act; 1858 (the 21 & 22 Vict. c. 100), the Act to regulate the office of clerk of petty sessions in Ireland. I shall refer to these Acts by their dates. I shall refer to an interpretation clause that words in the masculine gender shall include females, unless a contrary intention appears, as "a gender glossary."

In my opinion, the Acts of 1849 throw no light on the case, but they are the only Acts of the seven which contain a gender glossary. The question ultimately resolves itself into one of the construction of the Act of 1858. The Act of 1858 really deals with two distinct offices—1, the office of clerk of petty sessions in petty sessions districts, created by the Act of 1827, and 2, the office of clerk of the justices of any borough save Dublin, created by the Act of 1840. The interpretation clause (sect. 3) says:—"The word 'clerk' shall mean petty sessions clerk, and shall include the clerk of the justices of any borough save Dublin." This is the only Irish Act which deals both with the petty sessions clerks of districts and the clerks of justices in boroughs. Its plain object was to place both on the same footing, and so it has been always dealt with. I shall refer to the two classes of clerks as "district clerks" and "borough clerks" respectively. The only Acts dealing with the latter are the Acts of 1840 and the Act of 1858. The Acts of 1827, 1836, 1849, and 1851 deal with the district clerks only. The English Act of 1877 (40 & 41 Vict. c. 43) deals with both sets of clerks, but has no definition clause applying one term to both. The sections mention each, e.g., sect. 7. The definition clause in the Irish Act should have been of "petty sessions clerk" rather than of "clerk." I think it plain, however, that "petty sessions clerk" in the Act must include "borough clerks," e g., in sects. 5 and 8.

The preamble of the Act of 185 says:—"Whereas it is expedient further to regulate the office of clerk of petty sessions in Ireland," &c. This shows that the Act did not create a new office. Indeed, sect. 5 seems conclusive as to this. It shows also that the language of sect. 7 was not intended to create a new office. The two offices—that of the district clerks and that of the borough clerks—were separate, distinct, statutory offices, regulated by separate and distinct statutes down to 1858. The Acts applicable to either did not apply to the other.

The Act generally known as Lord Brougham's Act (13 Vict. c. 21) (1850) says in its 4th section: "Be it enacted that in all Acts words importing the masculine gender shall be deemed and taken to include females . . . unless the contrary as to gender is expressly provided." This is a very strong provision. However, in the Interpretation Act, 1889, under the title "Re-enactment of Existing Rules," sect. 1, says:—"In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears, words importing the masculine gender shall include females." Sect. 40, the saving clause as to the construction of prior Acts, is confined to the provisions of the Act respecting the construction of Acts passed after its commencement, and, therefore, does not apply to Acts between 1850 and the commencement of the Interpretation Act. It follows that "unless the contrary intention appears," and not the more stringent "unless the contrary as to gender is expressly provided," is the test to be applied to Acts since 1850. The Interpretation Act in this respect operates as a retrospective statutory declaration as to the effect of Lord Brougham's Act in regard to the matter dealt with in sect. 1 of the Interpretation Act. Sect. 41 repeals Lord Brougham's Act absolutely.

Having regard to what is said by Willes J., at page 387 of his judgment in *Chorlton* v. *Lings* (1), the difference between the words in Lord Brougham's Act and those in the Interpretation Act seems immaterial. However, it seems clear that now sect. 1 of the Interpretation Act must be applied to the Acts of 1851 and 1858, but that up to the 1st of January, 1890, Lord Brougham's Act applied to those Acts. There is no gender glossary Act prior to 1850.

The question whether women are included in general words in a statute creating an office or giving a right to vote for the election to an office was very fully considered in 1864 in the case of *R.* v. *Crosthwaite* (2) in the Queen's Bench and in the Exchequer Chamber. The effect of a gender glossary was also very fully considered. Although the Act in question was subsequent to Lord Brougham's Act, it had a special gender glossary. The

(1) L. R. 4 C. P. 374. (2) 17 I. C. L. R. 157, 463.

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question in that case was whether a woman was entitled to vote at an election for town commissioners.

Section 1 of the Towns Improvement Ireland Act, 1854, says:—"The following words and expressions in this Act shall have the meanings hereby assigned to them unless there be something in the subject or context repugnant to such construction . . ." "Words importing the masculine gender (except only the word 'male') shall include females." The decision in *R.* v. *Crosthwaite* (1) depended on the application of this section to the 22nd section of the same Act. That section contained two qualifications for electors:—1. Every person of full age who is the immediate lessor of premises of the value of £50 and who is resident within limits. 2. Also every person . . . lessor or occupier, rated, &c., and who shall have paid all such rates payable by him. It is difficult to find this latter sub-section (on which the case mainly turned) in either of the reports. It is omitted in the marginal note. Though four judges in the Queen's Bench Division and three in the Exchequer Chamber were of the same opinion, and four in the Exchequer Chamber were of a contrary opinion as to how the case should be decided, I think all were agreed that but for the Glossary clause the use of the word "him" in sect. 22 would have confined the word "person" to males. (See pp. 172, 470, 471, 473-4, 480-1, 486-7.) At p. 474 FitzGerald B. states the principle thus:—"The contention of the defendant is that the section ought to be so read; and it plainly lies on the relator to satisfy the Court that there is some repugnancy in the subject or in the context of the Act to such construction. I am not, however, prepared to give to the interpretation clause of this or any other Act of Parliament the very stringent effect which seemed to be asserted in the argument on the part of the defendant. On the one hand, I take it to be clear that, without the aid of any interpretation clause, words of an Act of Parliament importing the masculine gender may be construed to include females; but in such case the onus of showing a sufficient reason for so doing will lie on the party asserting that it should be done. On the other hand, the

(1) 17 I. C. L. R. 157, 463.

interpretation clause shifts the onus, and throws on the party asserting that the words should not be so construed the necessity of showing a sufficient reason why they should not be so construed."

I shall now apply these principles to the present case. I shall take the case of the borough clerks first, as it only involves two Acts—the Act of 1840 and the Act of 1858. The former Act (sect. 157) authorized separate Commissions of the Peace for certain boroughs. The Act of 1851 (the Petty Sessions Act) does not apply to these clerks. It is plain it only applies to the district clerks (see sect. 4, sub-s. 2). The English Act of the same year (chapter 55, sect. 9) applies to clerks in counties and boroughs. The Irish borough clerks are the clerks of the most important Petty Sessions in Ireland, viz., Belfast, Cork, Derry, Waterford, and other important towns. Sect. 162 of the Act of 1840 created the "office of clerk to the justices." [His Lordship read this section.] It contains the words "himself," "his," and "he," referring to the clerk. It authorized the justices of the borough "to appoint a fit person to be the clerk to the justices." The section is taken from sect. 102 of the English Municipal Corporations Act, 1835 (5 & 6 Wm. 4, c. 76). It was not repealed by the Act of 1858. The Statute Law Revision Act of 1892 purports to repeal the part of the section from the words last quoted to the end; but as sect. 1 of that Act provides that the repeal "shall not affect any office," it is quite immaterial for the purposes of this case. Sect. 195 provides that the clerk shall be entitled to the fees chargeable under the Act of 1827. This is the only reference to the Acts of 1827 and 1836. This section was repealed by the Statute Law Revision Act of 1875, but the repeal is "not to affect any office."

I think it is clear on the principles I have referred to that under sect. 162 the office was confined to males. That section continues in full force for this purpose, save so far as it is varied by the Act of 1858. It was passed seventy-eight years ago. Is there any reason for contending that the words of the masculine gender in the section should not have their ordinary effect? I think not. The corresponding section (102) of the English Act of 1835 (5 & 6 Wm. 4, c. 76) was considered by the King's

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Bench and the Exchequer Chamber in *Reg.* v. *Fox* (1). At p. 742 Lord Campbell said:—"The Legislature has provided that justices of the peace shall have the disinterested advice of a professional man as their clerk; and it is by virtue of this advice that our unpaid magistracy are enabled satisfactorily to administer justice. That advice, however, to be trustworthy, must be impartial. And, in order that it may be so, it is wisely provided that the clerk shall have no bias in his mind to advise the justices one way or the other; for he is to derive no advantage, directly or indirectly, from those cases in which he has to give advice. Hence the prohibition in the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), sect. 102, against either an alderman or councillor of the borough, or his partner, or any person in his employ, being appointed clerk to the justices." At p. 744 Erle J. said:—"Was the defendant thus interested? It turns out that his partner, Mr. Prothero, is entitled to fees upon the arraignment and trial of all prisoners arraigned and tried at the Quarter Sessions; that in some instances he has received fees upon the arraignment and trial there of prisoners committed for trial by the justices to whom the defendant is clerk, and that the defendant was, by the terms of the partnership, entitled to one-half of the fees so received. Whence it seems to me to be clear that the defendant had, continuously, a pecuniary interest." Lord Campbell evidently thought that the reference to the partner meant that he was to be a solicitor; and this, probably, was the intention. One thing is clear: a woman cannot be a solicitor, and a woman cannot be a partner of a solicitor. But, further, a married woman could not have been a partner prior to the Act of 1893, unless she had separate estate: Lindley, 4th edition, p. 90. See the remarks of Phillimore L.J. in *Bebb* v. *Law Society* (2) in relation to married women.

This English Municipal Corporations Act has a very full interpretation clause (sect. 142). It has the familiar words as to the singular including the plural, but it omits deliberately the equally familiar clause as to the masculine including the feminine. Section 215 of the Irish Act of 1840 is in the same terms.

(1) [1859] 1 E. & E. 729. (2) [1914] 1 Ch. 286.

The Act of 1827 says the justices may appoint "a fit and proper person" to be clerk; the Act of 1840, "a fit person"; the Act of 1851, "one fit person."

Sect. 7 of the Act of 1858 provides, in the case of the district clerks, that "As often as any vacancy shall arise in the office, . . . the justices shall appoint 'some proper person'" to fill the office. The provisions as to the appointment of the district clerks in the Acts of 1827 and 1851 were repealed. The provision in the Act of 1840 as to the Borough clerks was not repealed. The "fit person" clause is not even repealed by the Statute Law Revision Act of 1892. Accordingly, when dealing with the borough clerks, sect. 7 says, "When and so often as a vacancy shall arise," the clerk shall be nominated and appointed by the justices of the borough. No mention of "fit or proper person." The section then proceeds with the case of a district clerk serving two or more districts, and we have "some proper person" again introduced. The plain explanation of the separate mode of dealing with the borough clerks is, that the section providing for their appointment and qualification was in full force, while in the other cases the sections had been repealed. We must take the two Acts together. We find the qualification "a fit person" (not "a proper person" as in the other cases in sect. 7) in sect. 162 of the Act of 1840, and that fit person must be a male. There is nothing in the Act of 1858 to vary this. The fact that the gender glossary of the Interpretation Act or Lord Brougham's Act applies to the Act of 1858 does not affect this matter. They do not apply to the Act of 1840. It has an interpretation section (sect. 215), but it contains no gender clause. This is very remarkable. This is not a matter of construing the Act by reference to prior Acts repealed or unrepealed. It is the construction of the two existing statutes directly regulating the matter.

The omission of the gender clause from the interpretation section of the Act of 1840 seems to me very significant. It was plainly deliberate. We have the great authority of FitzGerald B., at p. 479 of *R.* v. *Crosthwaite* (1), that this omission operated to exclude females from offices under the Act. The Act is chap. 108 of its year. Chaps. 102, 105, and 107 are Irish Acts, and the

(1) 17 I. C. L. R. 157, 463.

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interpretation clauses in these Acts, viz., sects. 6, 77, and 107 respectively, have the gender clause; the two latter have in addition the remarkable words, "This Act shall extend to aliens, denizens, and women, both to make them subject thereto, and to entitle them to all the benefits given thereby." Chap. 109 has an interpretation section (14), but it does not contain the gender clause; chap. 110 has an interpretation section (29), which does contain the gender clause; chap. 113, an interpretation section (93), which does not contain the gender clause; chaps. 100, 103, 104, 111, 112 have no interpretation clause. The inference is irresistible that great care was taken to ascertain whether an Act should have an interpretation section. The special form of the section was carefully considered also, particularly as to whether it should include a gender clause. Such clauses were not indiscriminately inserted or applied. It depended on the intention of the Legislature in the particular Act whether they were inserted or not.

I have gone through the Act of 1858. The only masculine words in it are "he," "his," and "him." These words or one of them are applied 1, to the clerk; 2, to the Lord Lieutenant, 3, to the registrar of Petty Sessions clerks (sects. 5, 15, and 26); 4, to the sub-inspector of constabulary (sect. 21); 5, to one of the justices (sect. 25); and 6, to the respondent in an appeal (sect. 8, sub-s. 6). As to 2, 4, and 5 a gender glossary was plainly inapplicable. As to 6 it would be unnecessary. As to 3 it could not have been intended to alter his qualification. In these circumstances, if the glossary were in the Act itself, it might well have been argued, having regard to the discrimination I have shown to exist in the Acts of 1840, that it must have been inserted in reference to the clerk, and that it therefore showed the intention to extend the office to women. This argument wholly fails when the gender glossary is only contained in a general Act which applies it indiscriminately to all Acts passed after 1850, without regard to the object or provisions of any particular Act. Such a gender glossary is, in my opinion, very slight, if any, evidence of such an intention.

At p. 479 of *R.* v. *Crosthwaite* (1) FitzGerald B. says:—"I cannot persuade myself that the Legislature, by implication, by

(1) 17 I. C. L. R., at p. 479.

the mere force of an interpretation clause in a general form now common to almost every Act, intended to alter this state of things." This applies with much greater force where the interpretation clause is only found in a separate general statute which applies indiscriminately to every statute. There are no masculine words in sect. 7. Does the gender glossary clause by its application to the clerk in the other sections alter the existing constitution of the office under the Act of 1840? There is no repeal, there are no negative words, in the Act of 1858. Both statutes are affirmative. What is the law in such a case? "I take the rule of law to be that an affirmative statute is not, without express words, repealed by a subsequent affirmative statute, unless the two statutes cannot stand together": per Turner L.J., *Ex parte Warrington* (1). Here it seems to me that sect. 162 of the Act of 1840 and sect. 7 of the Act of 1858 not only can stand together, but that the latter Act necessarily implies the continuance in force of the former. Finally, in the *Beresford Hope Case* (2) Lindley L.J. says at p. 98:—"Before the Act passed it is quite obvious that women had no right to sit as members of a town council. Is that lawful now? Can we say that Parliament has altered this? To my mind the very utmost that can be said is that there is a doubt about it, and if there is a doubt about it, the law remains unaltered."

For this reason I am of opinion—1, that sect. 162 of the Act of 1840 confined the office of borough clerk to males; and 2, that there is nothing in the Act of 1858 sufficient to extend it to females. It is almost impossible to ascribe to the Legislature an intention that the office should be open to females in the country districts, but confined to males in the boroughs.

I shall now deal with the statutes as to the office of the district clerks. I shall not repeat the principles I have referred to in reference to the borough clerks. The same principles apply. The office was created by the Act of 1827, sect. 8, which authorized the justices at every Petty Sessions assembled to appoint one fit and proper person to be their clerk during their pleasure. I can find no indication of sex in this Act. The Act of 1836, in sects. 3, 4, 5, 6, and 12, dealing with the duties of the clerk

(1) 3 De G. M. & G., at p. 171. (2) 23 Q. B. D. 79.

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appointed under the Act of 1827, and referring to him as "the clerk of every Petty Sessions Court," uses the words "he," "his," and "him" in reference to the clerk. On the principles I have stated I think it clear that on these two Acts taken together the office was confined to males. Neither Act had any interpretation clause. It is remarkable that the Act of 1827 does not contain any of the words "he," "his," or "him."

Having regard to the date of the Act, in my opinion no inference can be drawn that the office was then open to women. It is plain, however, that it and the Act of 1836 must be read together; and if it is clear that the latter Act regulating the duties of the clerks appointed under the former applies only to males, it is clear that the former Act can only apply to males, as the latter Act is plainly intended to apply to all existing District Petty Sessions clerks. I am therefore of opinion that if the Act of 1836 is clearly applicable only to males, females were not eligible under the combined operation of the two Acts. The English Municipal Corporations Act of the year 1835 had the remarkable interpretation clause I have referred to.

I have looked at the statutes of the year 1836 in a general way. I find a careful attention to the question of sex in cases in which any question could arise. I shall give a few instances. In the Bankrupts (Ireland) Act (c. 14) "he" and "his" and "him" are used throughout, but sect. 160 provides that the Act "shall extend to aliens, denizens, and women both to make them subject thereto and to entitle them to all the benefits given thereby"; the Postage Act (c. 54, sect. 24); the Tithes Commutation Act (c. 71, sect. 12); the Newspaper Stamps Act (c. 76, sect. 35); the Lighthouses Act (c. 79, sect. 64) contain the usual gender clause. I give these as instances. On the other hand, the Sale of Bread Act (c. 37) does not contain the interpretation clause, but almost every section has the word "he," "she," or "they," or "his," "her," or "them." So the Paper Duties Act (c. 52), but where necessary, e.g., sect. 9, contains the word "him" or "her." Similarly sect. 16 of the Loan Societies (Ireland) Act (c. 55) contains the words "his," "her." Similarly sect. 59 of the Irish Valuation Act (c. 84) has "himself" or "herself." It will be seen that in these Acts where males only are intended "he" and "his" are alone used.

Most of the Acts—Military Acts, Constabulary Acts, Ecclesiastical Acts, Chancery Officers (Ireland) Acts, &c., have no gender clause, as they are obviously intended to apply only to men. In my opinion the Petty Sessions Act of 1836 is of the same class. It seems to me that in the case of the district clerks the same inference can be drawn from comparison with the legislation of the time or reference to sex that I have already pointed out in the case of the borough clerks.

In the year 1849 two important Petty Sessions Acts were passed (12 & 13 Vict. chaps. 69 and 70). Sect. 33 of the former and sect. 38 of the latter provide that "unless there be anything in the subject or context repugnant to such construction words denoting a male shall be deemed to include a female also. The clerk is referred to in both Acts, and in sect. 20 of the former Act as "he" and "him," but these Acts do not deal with or affect the office of clerk. The next Act is the important Petty Sessions Act. Lord Brougham's Act applied to this Act, which has no gender clause.

It is well known that the Irish Petty Sessions Act of 1851 was based on the English Acts known as Jervis's Acts (11 & 12 Vict. chaps. 42 and 43). These Acts have no gender clause; they were prior to Lord Brougham's Act. Sects. 30 and 31 of c. 43 repeatedly refer to the clerk as "he" and "him" when specifying some of his duties. These sections apply also to the borough clerks.

This seems to me of great importance. We have in Jervis's Acts the two classes of clerks dealt with together in language applicable to men only, and no interpretation clause. It must be taken as clear that at that time the borough clerks could only be men. This follows from the judgments in *R.* v. *Fox* (1), and the judgment of FitzGerald B. in *R.* v. *Crosthwaite* (2), to which I have already referred. The Petty Sessions Act is based on Jervis's Act; its meaning is clear, apart from Lord Brougham's Act. Can it be suggested that it was to have the effect of altering one of the fundamental qualifications for an existing office when the corresponding English Act shows no such intention?

(1) 1 E. & E. 729.

(2) 17 I. C. L. R. 157, 463.

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The object of the Petty Sessions Act of 1851 appears from the Preamble: "Whereas it is expedient to consolidate and amend the Acts regulating (*a*) the proceedings at Petty Sessions, and (*b*) the duties of justices of the peace out of Quarter Sessions in Ireland." Now, what are the Acts? They appear in sect. 43, and are the Acts I have referred to, viz., the Acts of 1827 and 1836, and the two Acts of 1849. The two latter Acts are repealed absolutely by sect. 43, but the two former are only repealed "so *far as relates to any proceedings by justices in or out of Petty Sessions.*" These two Acts were only wholly repealed by the Statute Law Revision Act of 1874; but that repeal was "not to affect any office," and was, therefore, inoperative for the purposes of this case.

As to the Act of 1836, sects. 3, 4, 5, and 6 (except the earlier parts of sects. 5 and 6), and sect. 12, deal exclusively with the duties of the clerk, and, therefore, plainly are not repealed. But these are the sections in which the words "he," "his," and "him" occur. These sects. 3, 4, 5, 6, and 12 of the Act must be read together with sect. 5 of the Petty Sessions Act, which does not purport to be an exclusive list of the duties of the clerk, and which does not include many of the matters dealt with by these sections.

Does the Act of 1851 create a new office and abolish the old office? Under the Act of 1827 the office was held at the pleasure of the justices. This was preserved by the Act of 1851, sect. 4, sub-s. 2, though a power of dismissal by the Lord Lieutenant was added by sect. 4, sub-s. 3. Sect. 2 says it shall be lawful for the "justices . . . of each Petty Sessions district upon the passing of this Act or whenever afterwards any vacancy shall occur to appoint a fit person to act as clerk of such Petty Sessions." By sect. 1 the old districts under the Act of 1827 were to continue until altered. It seems impossible to hold that sect. 2 involved the abolition of the old office, as this would amount to a dismissal of all the existing clerks. Sect. 7 of the Act of 1858 says they shall appoint; but this is only when a vacancy occurs. The words "it shall be lawful upon the passing of this Act" seem to me to have been introduced for the purpose of making new appointments when alterations of districts or

similar causes made it expedient. These words cannot be construed to involve the dismissal of all existing clerks without compensation. They are carefully provided for by sect. 5 of the Act of 1858.

Lord Brougham's Act and the Interpretation Act provide that words in the masculine gender shall include females; but there is no Act providing that they shall include unmarried females only. Sect. 2 of the Petty Sessions Act provides—"Before entering on the duties of the said office the said clerk shall enter into a recognizance in the Form D for the due discharge of the duties required of *him*."

It is plain that a married woman cannot enter into a recognizance: *Bennett* v. *Watson* (1). A married woman, therefore, is clearly not "a fit person" within sect. 2 to be appointed. Therefore, all the masculine pronouns in the Petty Sessions Act cannot include females generally. If so, must they not have their ordinary sense? But even if it could be held that the recognizance clause only declares married women not to be "fit persons," how does the Act provide for the case of an unmarried woman who gets married after her appointment? She then becomes an "unfit person." There is no provision for this case in the Act. Marriage cannot be said to be "neglect, misconduct, or incompetence" under sect. 4, sub-s. 3, which was obviously passed for the purpose of preventing the justices from retaining an officer who is unfit, in fact, for the office. See observations of Phillimore J. at p. 299 of *Bebb* v. *Law Society* (2), referred to above.

I now come to the Act of 1858. I shall deal shortly with it. The Act of 1827 empowers the appointment of "a fit and proper person," the Petty Sessions Act, 1851, of "a fit person," and the Act of 1858 of "a proper person." I am clearly of opinion that the Act of 1858 (21 & 22 Vict.) discloses no intention of altering the existing qualification. The latter Act is subject to Lord Brougham's Act and the Interpretation Act, in the same way as the Petty Sessions Act, and, like it, always uses masculine pronouns in relation to the clerk. Sect. 4 repeals sects. 2, 3, and 4 of the Petty Sessions Act, but provides for existing rights. Therefore, an existing clerk, notwithstanding sects. 5 and 8, sub-s. 1, cannot be

(1) B. M. & S. 1. (2) [1914] 1 Ch. 286.

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dismissed by the Lord Lieutenant save for the causes mentioned in sect. 4, sub-s. 3, of the Petty Sessions Act. Sect. 11 provides for recognizance as in sect. 2 of the Petty Sessions Act, but gives a discretion to the Lord Lieutenant to accept a guarantee society's security in lieu of the recognizance. This discretion does not, in my opinion, qualify a married woman for the office if she was disqualified prior to the Act. Section 7 seems the one important section bearing on this case. I have dealt with it at the beginning of this judgment. It shows that sect. 2 of the Petty Sessions Act, 1851, did not create a new office, as the language is practically the same. In 1850 Lord Brougham's Act was passed, and therefore applied to the Act of 1851, the Petty Sessions Act. For these reasons I am of opinion that the office of district clerk is also confined to males. The matter is not so clear as in the case of the borough clerks, but once it is established that the office is confined to males it raises a strong presumption that the consolidated office must be similarly confined. Of course, if I am right in the conclusion that I have come to on the construction of all the Acts taken together, this disposes of the case.

I shall, however, deal with the question of disqualification at common law, as it has been so fully argued. *Bebb's Case* (1) was decided on the ground that it was settled by the common law that a woman could not be a solicitor. There is no such decision as to the common law in the case of a Petty Sessions clerk. The exclusion is put on the ground that a woman is incapable of holding (*a*) a judicial, (*b*) a public office. In *R.* v. *Justices of Cork* (2) Palles C.B., in giving the judgment of the Court (Palles C.B., Andrews and Johnson JJ.), said :— "This office, no doubt, is a public office, and it is a statutory office. In *Hamilton* v. *Coningham* (3), Gibson J. incidentally describes a Petty Sessions clerk as a "judicial officer." In *M'Creery* v. *Bennett* (4), Kenny J., referring to that statement, says that his position "is that of a public and judicial officer." Barton J. says, "It appears to me that we are hardly concerned upon the present motion with . . . the nature and character of

(1) [1914] 1 Ch. 286.
(2) 43 I. L. T. R., at p. 134.
(3) [1903] 2 I. R., at p. 567.
(4) [1904] 2 I. R., at p. 72.

the office of Petty Sessions clerk." I do not myself see that any question arose in either case as to that matter, and these statements are simply dicta; but, of course, they express the opinions of two eminent judges, but not on a matter involved in the decision of the cases, or affecting the legal position of women.

The case of *R.* v. *Crosthwaite* (1) is the important Irish case on the subject. The English cases are fully dealt with by Lord Robert Cecil in his argument in *Bebb's Case* (2), and a remarkable collection will be found in Cruise's Digest, vol. iii, p. 92, Title "Officers." I do not intend to go through them.

I think it plain from the statutes that the Petty Sessions clerk has no judicial duties to perform. He is essentially a clerk only. He does not even take down the orders of the Court. It required a special section to provide that he should not discharge his duties by deputy, clearly showing that they were not judicial duties. I can find little help in the various cases as to the position of women in relation to such an office. I think it must have varied with the period. In early times women were treated as helpless creatures. A married woman's contract was void; an infant's only voidable. A husband had the same right to chastise his wife as his children. Indeed, in vol. i, pp. 444, 445, of Blackstone, the author fully states this, and adds, "Yet the lower people, who were always fond of the old common law, still claim and exert their ancient privilege." It seems to me absurd to apply old cases to the position of women at the present day. As Lord Cozens-Hardy said of the old cases as to blasphemy: "This is one of those subjects in which there have undoubtedly been great changes of opinion within the last one hundred years, and, I think, within the last half-century. It is really a question of public policy, which varies from time to time. It is, to my mind, almost shocking to hold in the twentieth century that the publications of Positivists, and other schools of philosophers, who do not admit, and probably even deny, the existence of God, are necessarily blasphemous. I think the older view must now be regarded as obsolete, and any decision to that effect ought no longer to be followed": *Re Bowman* (3). The Court of Appeal were unanimous

(1) 17 I. C. L. R. 157.
(2) [1914] 1 Ch. 286.
(3) [1915] 2 Ch. 462.

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in the case, and the decision was affirmed by the House of Lords (1) (Lord Finlay C. dissenting).

I think these remarks apply with equal force to old dicta or cases as to the general unfitness of women to fill any office. It is really absurd to suggest at the present day that there should be any general rule excluding women from such a position as the present. It is plain from the judgments in all the cases that the rule is one of public policy. I shall mention two cases: *Maxim Nordenfelt Guns and Ammunition Company* v. *Nordenfelt* (2) and *Evanturel* v. *Evanturel* (3), which establish that where the principle of public policy is involved, the Court has to look to public policy as then existing, and not to public policy as it may have existed at an earlier date. See the judgment of Bowen L.J. in the *Maxim Nordenfelt Case* (4), where he cites the decision of the Privy Council in *Evanturel* v. *Evanturel* (3), and the speech of Lord Watson in the same case in the House of Lords (5).

In this case the power is to appoint "a fit person." A person disqualified by the common law would not be a fit person. The case differs from *Chorlton* v. *Lings* (6) and most of the other cases in this, that it is not the case of a statute giving rights to certain persons; it is a power to appoint a fit person.

When is the "fitness" to be ascertained? I should think plainly at the date of the appointment. In the present case, assuming that the only Acts were the Acts of 1827 creating the office and the Act of 1858 there would then be three possible dates, 1827, 1858, and 1917. If it were held that the fitness was to be ascertained as of 1827, persons then disqualified by religion or otherwise would be excluded. So far therefore as general legal disqualification is concerned the matter must be determined by the law in 1917. We have two judgments dealing with the Common Law disability of women. One is that in *Chorlton* v. *Lings* (6) of Mr. Justice Willes, probably the greatest authority on the Common Law among English judges of the

(1) [1917] A. C. 406.
(2) [1893] 1 Ch. 630; [1894] A. C. 535.
(3) L. R. 6 P. C. 1, 29.
(4) [1893] 1 Ch., at p. 665.
(5) [1894] A. C., at pp. 553, 554.
(6) L. R. 4 C. P. 374.

nineteenth century. Mr. Dicey (Constitution, page 506) describes him as "a jurist whose dicta are more weighty than most considered judgments." The other is that in the *Queen* v. *Crosthwaite* (2) of Baron FitzGerald, who is considered by some very capable judges, including the Lord Chief Baron, to have been the greatest lawyer on the Irish Bench in the nineteenth century. Both judges are remarkable for "their extraordinary accuracy" as was said of Sir G. Turner by Lord Cozens-Hardy.

The judgment of Willes J. was delivered in 1868, that of Fitzgerald B. in 1864—both practically fifty years ago. One was on a statute of 1867, the other on a statute of 1854. The passage at the end of the judgment of FitzGerald B. seems to me of great importance.—"I am quite ready to admit that reasons founded on a presumed inferiority of women in understanding and discretion to men are to be much more liberally dealt with now than they perhaps ever were. Altered states of society necessarily modify the application of all laws to some extent; for, in truth, the law would not continue the same if applied in the same way to an altered state of things. But, without holding any essential inferiority of women to men in judgment and discretion, I can have no doubt that in substance the reason of the common law still applies, and that the course of education and mental training to which women, happily for us and themselves, are subject, does render them far less fit than men for the administration of public affairs, and interference in the election to offices concerned in such administration. Having regard to every one of the reasons of the common law, the subordination of sex, the inferiority of bodily ability, and the mental inferiority, in the sense explained, as well as to decency and decorum, I am not sorry that I am able, on the best consideration I have been able to give the case, to come to the conclusion that this judgment ought to be reversed."

This all seems based on the assumptions—1, that the principle of the common law excluding women is a rule of public policy, that the reasons of the rule are those mentioned, and that they continued to exist, viz.:—1, subordination of sex; 2, inferiority of bodily ability; 3, mental inferiority, due to course of education

(1) 17 I. C. L. R. 157, 463.

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and training; 4, decency and decorum. On the other hand, the final part of the judgment of Willes J., in *Chorlton* v. *Lings* (1), is as follows :—"It is clear that a woman has no such right in either case"—i.e. to choose her representative in the House of Commons, or to be represented in the House of Lords—"and that the absence of such right is referable to the fact that in this country, in modern times, chiefly out of respect to women, and a sense of decorum, and not from a want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs." Therefore, Willes J. says the reason of the rule is not that women are "unfit," but that they are excluded from voting chiefly out of respect to them, and from a sense of decorum he only relies on the last of the grounds mentioned by FitzGerald B.

We find in *The Queen* v. *Crosthwaite* (2), in the Queen's Bench, the late Lord FitzGerald, then FitzGerald J., and a young man, saying he did not concur in the opinion that ladies were not entitled to sit as town commissioners. This opinion had been expressed by Lefroy C.J. (3) :—"The qualification to be a town commissioner is the qualification to carry out the duties enjoined by the Act . . . Now, to be qualified to superintend, and direct, and manage, and contract with reference to these subject-matters, is quite evidently a sort of qualification which is just as inappropriate to the character of females, and the performance of such duties by them, it would be as unreasonable to expect, as it is reasonable and appropriate that a person who has property which is liable to be taxed, and in reference to which it is important that these several duties should be effectually carried out,—I say nothing can be more appropriate than that the persons interested in the discharge of those duties should have a share in the election of those who are to carry them out."

This is not surprising when we remember that the Lord Chief Justice was "Tom Lefroy," the friend of Jane Austen, and, according to one of her biographers, the only man with whom she ever had a flirtation. It is, indeed, difficult to imagine one of Jane Austen's ladies being a town councillor or a Petty Sessions

(1) L. R. 4 C. P. 374. (2) 17 I. C. L. R., at p. 174. (3) Ib., at p. 162.

clerk. This appears to me a good illustration of the views of Lord Cozens-Hardy. Are we to apply to the present day the position which women occupied in the time of Jane Austen?

As to *Beresford Hope* v. *Sanders* (1), Mr. Comyn by his able argument satisfied me that, apart from Lord Esher, the judgment was based on sect. 63 of the Municipal Corporations Act. I have since found this view confirmed by Lord Esher himself. In *De Sousa* v. *Cobden* (2) he says in reference to that case: "The whole of the Court thought that the context of the Act contained matter which negatived the supposition that the words were intended to include women, because the Act expressly mentions women when it is intended to include them. Sect. 63 expressly provides that for purposes connected with the right to vote at elections, words importing the masculine shall include women. That was the view of the Court. I went further, and held that, apart from sect. 63, it appeared from the subject-matter that women were not intended to be included. I think so still. The ground I took was that by the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well-recognized custom to the contrary has been established, as in the case of overseers of the poor."

It is plain that Lord Esher, in dealing with the statement of the law in *Chorlton* v. *Lings* (3), overlooked the word "like" in the words "judicial and like public functions" in the judgment of Willes J. If that judge had only defined the "like public functions," it would have been a great help in this case. The *Beresford Hope Case* (1) differs from *Chorlton* v. *Lings* (3) and *R.* v. *Crosthwaite* (4) in one important particular, which it has in common with the present case. It turned on sect. 11, sub-s. 1, of the Municipal Corporations Act of 1882, which enacts that the councillors shall be "fit persons elected by the burgesses" (see the judgment in 23 Queen's Bench Division, at p. 84). The case was decided in the Queen's Bench Division on the ground of the general incapacity of women at common law, as stated in *Chorlton* v. *Lings* (3). The case then came before the full Court of Appeal,

(1) 23 Q. B. D. 79.
(2) [1891] 1 Q. B., pp. 690–691.
(3) L. R. 4 C. P. 374.
(4) 17 I. C. L. R. 157.

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consisting of six judges. Only one (Lord Esher) rested his judgment on this ground. Four deliberately refrained from expressing any opinion on the subject. One (Lopes L.J.) intimated his opinion that but for the 63rd section he would have decided the other way.

The *Beresford Hope Case* (1) was only twenty years later than *Chorlton* v. *Lings* (2). As the general incapacity of women would have decided the case, and was the ground of the decision in the Court below, the course taken by the four judges in the Appeal Court seems to me to indicate that they must at least have thought that in 1889 the matter was doubtful. We are now in the year 1918, twenty-nine years later, forty-nine years later than *Chorlton* v. *Lings* (2), and fifty-four years later than *R.* v. *Crosthwaite* (3). Taking again the passage in the judgment of FitzGerald B., can there be any doubt that in the last fifty years, i.e., since that judgment, things have so changed that the general disqualification of women at common law no longer exists? For these reasons I have arrived at the conclusions stated at the beginning of this judgment.

MOLONY C.J.:—

The suppliant acted for a number of years as assistant to her father, who was Petty Sessions clerk for the Petty Sessions district of Sixmilebridge and Newmarket-on-Fergus in the county of Clare, and on his retirement on the 15th June, 1915, she was unanimously elected to the office by the justices sitting at petty sessions.

When the matter was submitted to His Excellency the Lord Lieutenant, he was advised that a woman could not legally be appointed as Petty Sessions clerk, and accordingly this petition of right was presented by the suppliant to His Majesty, praying for a declaration that she is qualified, notwithstanding her sex, to hold the office of Petty Sessions clerk.

The Attorney-General, in his plea, submitted that in point of law the suppliant is disqualified and ineligible, owing to her sex, from being elected or appointed to, or holding the office of, Petty

(1) 23 Q. B. D. 79. (2) L. R. 4 C. P. 374.
(3) 17 I. C. L. R. 157.

Sessions clerk. The Attorney-General also submitted that the relief sought by the suppliant could not in law be claimed by or granted on a petition of right; but this point was expressly waived at the hearing, and the only question upon which our declaration is sought is as to whether the suppliant is disqualified by reason of her sex. It was admitted that for a number of years she had assisted her father in the performance of the duties of the office, and that she is thoroughly qualified by her education and experience to properly discharge them.

In order to decide the question in issue, it is necessary to inquire shortly into the history of the office. At first magistrates used to act singly, but after a time it became usual to have periodical meetings of magistrates, and these meetings became known as Petty Sessions.

At this time there was no statutory provision for a clerk. A magistrate might act without the assistance of a clerk, or might obtain the assistance of any person he wished in filling up warrants, recognizances, or convictions, or any of the other documents required to be filled up in the performance of the duties of the office.

In 1827 an Act was passed for the better administration of justice at the holding of Petty Sessions by justices of the peace in Ireland, 7 & 8 Geo. 4, c. 67. It recited that the holding of Petty Sessions by justices of the peace in Ireland had been found conducive to a better administration of the laws and to the general interests of His Majesty's subjects within that part of the United Kingdom, and that it was expedient to afford additional facilities for holding such Petty Sessions, and for securing a uniform and effectual mode of procedure therein. The Act then provided for the creation of Petty Sessions districts, and for the granting by the grand jury of an annual sum for the rent of a public justice room. And it then provided (sect. 8) that it should and might be lawful to and for the justices at every such Petty Sessions assembled to appoint "one fit and proper person to act as their clerk during their pleasure," and the clerk was authorized to receive certain fees as set out in the schedule to the Act. Sect. 11 of the Act provided that a registry or record in writing should be kept by each clerk of Petty Sessions of all acts or orders and

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proceedings done at such Petty Sessions, whether in civil or criminal cases, and that such registry or record should be signed on each day on which such Petty Sessions should be holden by all the justices present; and that no summons, warrant, conviction, committal, information, recognizance, or any other magisterial act or order of any kind be issued or signed at such Petty Sessions without making an entry thereof in the record or registry.

Some time afterwards, the 6th & 7th Wm. 4, c. 34, was passed, with the object of further defining the duties to be performed at Petty Sessions. This statute provided by section 3 that the clerk of Petty Sessions should enter in the book kept by him an account in writing of all fines and penalties imposed by the Court and paid to or deposited with him, and of the appropriation thereof.

Section 4 enacts that he should make a return every three months under his hand in the form in the schedule to the Act annexed of the proceedings at such Petty Sessions and of the appropriation of the fines and the penalties. Section 5 provides for the transmission of informations, &c., taken before a justice not sitting at Petty Sessions to the clerk of Petty Sessions of such district, and for such information to be by him laid before the bench of justices at the next Petty Sessions. Section 6 is to the same effect in reference to the transmission by the clerk of Petty Sessions to the Clerk of the Crown of all informations, &c., and of the entry of particulars in the prescribed book of the informations so transmitted by him. These four sections are relied upon for the purpose of showing that in the contemplation of the Legislature the occupant of the office of Petty Sessions clerk would necessarily be a man, because of the use in the sections of the words "him" and "his."

As was pointed out by FitzGerald B. in the *Queen* v. *Crosthwaite* (1): "On the one hand, I take it to be clear that without the aid of any interpretation clause, words of an Act of Parliament importing the masculine gender may be construed to include females; but in such case the onus of showing a sufficient reason for so doing will lie on the party asserting that it should be done. On the other hand, the interpretation clause shifts the onus and throws on the party asserting that the word should not be so

(1) 17 I. C. L. R. 463, at p. 474.

construed the necessity of showing a sufficient reason why they should not be so construed." It seems to me that the word "him" in the sections of the Act of 1836 referred to cannot be read as if it were "him" or "her" in the absence of an interpretation clause or some clear indication in the statute itself, and that consequently the clerk of Petty Sessions there referred to must necessarily be a man.

The next occasion upon which the Legislature dealt with the appointment of clerks to justices was in the Municipal Corporations Act, 1840 (3 & 4 Vict. c. 108), under sect. 162 of which power was given to the justices of every borough to appoint "a fit person to be clerk to the justices of such borough." The section provides that it shall not be lawful for the said clerk to the justices, "by himself or his partner," to be interested or employed in the prosecution of any offender; and it has been argued that so far as clerks to borough justices are concerned, these words, occurring in the section which creates the office, sufficiently indicate that the holder of the office must be a man, and I agree with this argument.

On the 10th June, 1850, an Act was passed with the object of shortening the language used in Acts of Parliament (13 Vict. c. 21), and by sect. 4 of that Act it was enacted that in all Acts words importing the masculine gender should be deemed and taken to include females, and the singular to include the plural and the plural the singular, unless the contrary as to gender or number is expressly provided.

In the following year the Petty Sessions (Ireland) Act (14 & 15 Vict. c. 93) was passed with the object of consolidating and amending the Acts relating to proceedings at Petty Sessions in Ireland. This Act proceeded to lay down a code for the administration of justice at Petty Sessions. Under sect. 2 the justices of Petty Sessions were empowered upon the passing of the Act, or whenever afterwards any vacancy should occur by reason of the death, retirement, or dismissal of any clerk, to "appoint one fit person to act as clerk of such Petty Sessions," who, prior to entering upon the duties of the office, should enter into a recognizance before some justice of the county, conditioned for the due discharge of the several duties required of him under the provisions of the Act, with one or more sureties and in such

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amount as the Lord Lieutenant shall direct. Under sect. 3 he was declared entitled to certain fees, and under sect. 4 certain disqualifications were imposed upon him, and it was expressly provided that he should hold office during the pleasure of the justices of the district, and that he should be subject to being dismissed by the Lord Lieutenant for neglect, misconduct, or incompetency in the discharge of his duties as Petty Sessions clerk, and that he should perform the duties of his office in person and not by deputy. The duties are set out in detail in sect. 5. In this Act a recognizance is first referred to, and attention has been drawn to the fact that a married woman could not at that time enter into a valid recognizance.

The Petty Sessions Act of 1851 repealed the statutes 7 & 8 Geo. 4, c. 67, and 6 & 7 Wm. 4, c. 34, so far as these Acts related to proceedings by justices in or out of Petty Sessions.

The law in reference to Petty Sessions clerks was further amended by the Petty Sessions Clerk (Ireland) Act, 1858 (21 & 22 Vict. c. 100), which, by sect. 7, gave power to justices as often as any vacancy should arise in the office of Petty Sessions clerk "to nominate and appoint some proper person to fill the said office," and also gave power to justices of any borough within the meaning of the Municipal Corporations Act, 1840, to appoint a clerk for the Borough Petty Sessions. The tenure and duties of the office are set out in sect. 8, in which it is provided that he shall hold such office during the pleasure of the justices of the district or districts of which he shall be clerk, and of the Lord Lieutenant; and in addition to the duties imposed upon him under the provisions of the 5th section of the Petty Sessions Act, he is required to perform the several duties imposed upon him by the Act with reference to the keeping and accounting for all sums of money received by him in his official capacity, and should also observe and perform all the other regulations of the Act in reference to his office and the duties thereof. Certain provision is made for his salary, and under sect. 11 every person who is appointed a clerk is required to give security for the due discharge of his duties as such clerk by a recognizance, with a proviso that it should be lawful for the Lord Lieutenant to direct that the security of any guarantee society established by Charter or Act

of Parliament in Great Britain or Ireland may be accepted in lieu of such security by recognizance.

It is obvious that the person appointed a clerk of Borough Sessions under this statute must be a man; and, on a review of all the statutes, I find myself compelled to agree with the conclusion of Ronan L.J., that the same result follows as regards clerks of Petty Sessions.

I regret the result, as, apart from the statutory disqualification, I can see no reason why a lady should not be appointed a clerk of Petty Sessions. It is, however, said that the suppliant is by reason of her sex debarred at common law from holding any public office, and in support of this view the passage from Pollock and Maitland (History of English Law, vol. i, p. 485), founded on Glanvill, has been strongly relied on: "As regards private rights, women are on the same level as men, though postponed in the canons of inheritance; but public functions they have none. In the camp, at the council-board, on the bench, in the jury-box there is no place for them." I think this may be accepted as a general statement of the position at common law, but it seems to me impossible in the light of all the authorities, ancient and modern, to hold that a woman could not at common law occupy a position analogous to that of a clerk of Petty Sessions—which is in no sense judicial—when we find her discharging at various times administrative, and in some cases, executive duties of far greater importance than a clerk of Petty Sessions could ever be called upon to perform.

Several instances have been given as to the various offices which have been held by women. In Callis on Sewers reference is made to the Countess of Warwick, who purported to act as Commissioner of Sewers under the 23rd of Henry 8, c. 5, sect. 10, which statute provided that the "Commission of Sewers shall be granted by the king to such person and persons as the said lords should appoint." Callis says (edition 1685, p. 253; 4th edition, p. 299): "The word 'persons' stands indifferently for either sex; and, therefore, although by the weakness of their sex they are unfit to travel, and they be for the most part incapable of learning to direct any matters of judicature, for which causes they have been discreetly spared; yet I am of opinion, for the authorities,

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reasons, and causes aforesaid, that this honourable countess being put into the Commission of Sewers, the same is warrantable by law, and the ordinances and decrees of Sewers made by her and the other Commissioners of Sewers are not to be impeached for the cause of her sex."

It was held in *Olive* v. *Ingram* (1) that a woman is capable of being a sexton, and of voting in the election. In the course of the argument in that case there were two points made—first, whether a woman was capable of being chosen sexton; and, secondly, whether a woman could vote at the election; and Strange observes, as to the first, the Court seemed to have no difficulty about it, there having been many cases where offices of greater consequence have been held by women, and there being many women sextons now in London. The authorities cited upon this point in *Olive* v. *Ingram* (1) were Spelman's Gloss., 497; Mich. 2 Anne, a woman appointed Governor of Chelmsford Workhouse; Lady Broughton's case; she was keeper of the gatehouse; 3 Keb. 32; Blunt's Tenures, 47; 4 Inst. 221; 215 Dy. 285; Hob. 148; and it is there pointed out that in Brady's History of Boroughs it appears that my Lady Packington was returning officer for members of Aylesbury.

In *The King* v. *Stubbs* (2) it was held that a woman could be appointed an overseer of the poor. Ashhurst J., in giving the judgment of the Court, said:—"We think that the circumstance of one of the persons appointed being a woman does not vitiate the appointment. The only qualification required by 43 Elizabeth is that they shall be substantial householders: it has no reference to sex. The only question then is, whether there be anything in the nature of the office that should make a woman incompetent? And we think there is not. There are many instances where, in offices of a higher nature, they are held not to be disqualified: as in the case of the office of high chamberlain, high constable, and marshal; and that of a common constable, which is both an office of trust, and, likewise, in a degree, judicial. So in the case of the office of sexton. As to the case in Vin. Tit. Poor, 415, that is no conclusive authority. It is to be collected from the case that there were other persons in the parish proper

(1) 2 Strange's Reports, 1114. (2) 2 Term Reports, 395.

to serve, and, if so, the Court held that the justices had not acted improperly in refusing to approve of a woman; where there are a sufficient number of men qualified to serve the office, they are certainly more proper: but that is not the case here; and, therefore, if there be no absolute incapacity, it is proper in this instance from the necessity of the case. And there is no danger of making it a general practice; for as the justices are invested with a discretionary power of approbation, it is not likely that they will approve of such an appointment where there are other proper objects." It seems to me that a good deal of the judgment of Ashhurst J., delivered in 1788, is applicable to the present case. Even if a woman was under no statutory disability, it is obvious that a man would generally be preferred, and that a lady would have very little chance of being chosen unless she had the very exceptional qualifications and experience which the suppliant was able to rely on when seeking election.

Serjeant Matheson, however, says that whatever may be the authority of these old cases, it is now settled that at common law a woman could not be entitled to exercise any public function; and he relies particularly on the statement of Lord Esher M.R. in *Beresford Hope* v. *Lady Sandhurst* (1) to the effect—"I take the first proposition to be that laid down by Willes J. in the case of *Chorlton* v. *Lings*" (2). I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public function." In *Chorlton* v. *Lings* (2) it was held that women are subject to a legal incapacity from voting at the election of members of Parliament, but I do not think the case can be relied on as justifying the sweeping generalizations of Lord Esher. It was there contended on behalf of the appellant that there was originally no distinction between men and women as regards the power of voting, and that subsequent legislation had not introduced any such distinction. Bovill C.J., however, came to the conclusion that women were not entitled to vote; and he relied upon the fact that for several hundred years no instance was to be found of the exercise by women of any such right. He did not, however, deal specifically with the question as to what offices

(1) 23 Q. B. D. 79, at p. 95. (2) L. R. 4 C. P. 374.

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a woman might hold, and he said (at p. 384):—"The decisions as to what offices women may hold, and whether they come within the description of particular statutes, do not materially assist us in this case." And Willes J., in a most learned judgment, also came to the conclusion that women had no such right; and he said at p. 392:—"The absence of such right is referable to the fact that in this country in modern times, chiefly out of respect to women and a sense of decorum, and not from their want of intellect or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs." He does not, however, in any place in his judgment assert that a woman is by law debarred from occupying any public office. To the same effect is the judgment of the Exchequer Chamber in Ireland as regards election of town commissioners: *The Queen* v. *Crosthwaite* (1), where it was admitted by FitzGerald B. (p. 476) that the incapacity was not absolute. It has since been held in *Nairn* v. *The University of St. Andrews* (2) that a woman is not entitled to vote in the election of the Parliamentary representative of the university; and in *Bebb* v. *The Law Society* (3) women were held to be under a common law disability, by reason of their sex, to become attorneys or solicitors. This disability, however, was grounded on the fact, as stated by Cozens-Hardy M.R., of that long uniform and uninterrupted usage, which is the foundation of the greater part of the "common law of this country, and which we ought, beyond all doubt, be very loth to depart from," and not from any consideration of the nature of the office.

Lord Esher himself in the subsequent case of *De Souza* v. *Cobden* (4) admitted that there were exceptions to his rule:—"The ground I took was that by the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well-recognized custom to the contrary has been established, as in the case of overseers of the poor; and, of course, if women are specially mentioned in an Act of Parliament, they will be qualified." Without being specially mentioned or mentioned at all, there

(1) 17 I. C. L. R. 463.
(2) [1909] A. C. 147.
(3) [1914] 1 Ch. 286.
(4) [1891] 1 Q. B. 687, at p. 691.

are many public offices created by modern Acts of Parliament held at the present moment by women who, under the definition of Lord Esher, would be excluded by reason of their sex. Take the Factory Acts, for example. Under sect. 118 of the Factory and Workshops Act, 1901, the Secretary of State, with the approval of the Treasury as to numbers and salaries, may appoint "such inspectors, and such clerks and servants as he thinks necessary" for the execution of the Act; and by sect. 119 the powers of an inspector are defined, and words of the masculine gender are employed throughout. There is no doubt but that the office of inspector is a public office, but we see ladies following the office with ability and marked success, and their elegibility has never been doubted. The Crown admit this is so, but endeavour to draw some distinction from the peculiar nature of the duties of a Petty Sessions clerk. I cannot see that there is any ground for such a distinction. The clerk of Petty Sessions is a clerk and nothing more, requiring no doubt an education sufficient to pass a qualifying examination, and a knowledge of the forms used in Petty Sessions practice, and of the procedure followed by the Court. His status is less than that of a civil servant. He holds his office during the pleasure of the justices and the Lord Lieutenant, and it may be determined at any time at the will of either of these parties: *R.* (*Whitley*) v. *Justices of Co. Cork* (1); and the Court will not interfere if he is dismissed summarily, and without cause assigned: *Ex parte Sandys* (2).

On the whole case I am unable to see that the suppliant is debarred either by the common law or any ground of public policy from occupying the position of Petty Sessions clerk; but inasmuch as the statutes we are dealing with in this particular case prohibit the appointment of a woman, I think that the suppliant is not entitled to a declaration that she is qualified, notwithstanding her sex, to hold the office of Petty Sessions clerk.

Solicitor for the appellant: *R. W. Frost.*
Solicitor for the Crown: *The Chief Crown Solicitor.*

R. ST. J. C.

(1) 43 I. L. T. R. 133.

(2) 4 B & Ad. 863.

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May 8, 9.

## HESTER CAROLINE VANDELEUR *v.* WILLIAM HENRY SLOANE AND OTHERS.

(1916. No. 167.)

*Will—Estate in really—Estate tail—Limitation of—Name and Arms Clause—Condition—Condition precedent or subsequent—Statute of Limitations—Action for the Recovery of land.*

Real estate was limited by a will to E. N. and her heirs male, "she and they and her husband taking the name and bearing the arms of N." *Held*, that these words formed no portion of the limitation of the estate tail, but imported at most a condition subsequent. Also *held*, that an action instituted by a descendant of E. N. (whose immediate predecessor had barred the entail in the lands), claiming a declaration of title, subject to the rights of the defendants who were occupying tenants, was an action for the recovery of land within 3 & 4 Wm. 4, c. 27, s. 1, as amended by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57).

ACTION.

Matthew Nesbitt, who was owner in fee simple of certain lands, including the lands of Cloonboniagh, by his will, dated the 14th October, 1812, provided as follows:—"I will and bequeath to my only son Francis Nesbitt all my real and personal estate and all my property of every kind and description for and during the term of his natural life and then to his heirs male lawfully to be begotten the eldest to be preferred and then in case of failure of male issue in the said Francis Nesbitt the said real estates to become the property of my daughter Elizabeth Nesbitt and her issue male lawfully to be begotten she and they and her husband taking the name and bearing the arms of Nesbitt, and in case the said Elizabeth should die without issue male as aforesaid then said properties and real estates to be equally divided between my other children."

By a codicil to his will, dated the 30th November, 1821, the said Matthew Nesbitt devised the said lands of Cloonboniagh to Anne Doyle and her five children, Anne, Susan, Alexander, John, and Matthew, "share and share alike during their lives or the life of the survivor or longest liver of them."

The said Matthew Nesbitt died in 1823, and his will and codicil were duly proved. On his death, Francis Nesbitt entered into possession of the lands so devised, save the lands of Cloonboniagh, which under the said will passed into the possession of Ellen Doyle and her children.

In 1831 Francis Nesbitt purported to suffer a recovery of all the lands devised by his father's will, but, the Doyle family being then in possession of the lands of Cloonboniagh, the recovery failed as to these lands, there being no legal tenant to the praecipe (1).

Francis Nesbitt died on the 7th January, 1854, leaving him surviving an only son, Francis H. W. Nesbitt. The latter died without issue on the 14th October, 1879, whereupon the estate in tail male in the lands of Cloonboniagh, limited by the will of Matthew Nesbitt to Elizabeth Nesbitt, took effect, subject to the respective life interests of the Doyle family.

The said Elizabeth Nesbitt in 1829 inter-married with George Hamilton Beresford, of which marriage George de la Poer Beresford was the eldest son. Elizabeth Nesbitt died in the year 1847, leaving the said George de la Poer Beresford her surviving.

Matthew Doyle, the last surviving member of the Doyle family, died on the 16th March, 1905, whereupon the said George de la Poer Beresford became entitled to an estate in tail male in possession in the said lands of Cloonboniagh, and on the 11th July, 1913, he executed a disentailing assurance of the said lands.

By his will, dated the 8th May, 1911, the said George de la Poer Beresford devised and bequeathed to his trustees all his real and personal estate upon trust to sell the same at their discretion, and to pay thereout his funeral and testamentary expenses, debts, and legacies, and to invest the residue, and to pay the income to the testator's wife for her life, and after her death to hold the said residuary moneys and investments in trust for his daughter, the plaintiff in this action.

The said George de la Poer Beresford survived his wife, and died on the 7th October, 1913, leaving his daughter and devisee, the plaintiff, him surviving.

(1) So held in *Witham* v. *Notley*, [1913] 2 I. R. 281.—REP.

*M. R.* 1917.

VANDELEUR *v.* SLOANE.

The defendants were tenants in possession of the lands of Cloonboniagh, save one, who had acquired a possessory title of non-payment of rent for upwards of twelve years prior to the action.

Neither George de la Poer Beresford nor the plaintiff ever entered into either possession or receipt of the rents and profits of the lands of Cloonboniagh.

The writ of summons, which was issued on the 18th of February, 1916, was endorsed with a claim for a declaration that the plaintiff was entitled to an estate in fee simple in possession in the town and lands of Cloonboniagh South, otherwise Cloonboynagh, in the barony of Mohill, and county of Leitrim, subject to the defendants' rights as tenants under the Land Acts. By the statement of claim, which was delivered on the 23rd day of November, 1916, and which set forth the plaintiff's title, the plaintiff claimed, in addition to such declaration, an order for delivery of possession of the lands.

The defendants by their defence denied that on the true construction of the will of the said Matthew Nesbitt the said George de la Poer Beresford, through whom the plaintiff claimed, ever was seised of or entitled to an estate tail or any estate in the lands; and they relied on the Real Property Limitation Acts, 1833 and 1874, and pleaded possession of the lands.

*S. L. Brown K.C.*, *H. Wilson K.C.*, and *Sealy*, for the plaintiff.
*Jellett K.C.*, and *Price*, for the defendants.

Nov. 23.

O'CONNOR M.R.:—

This action was brought substantially for the purpose of establishing the plaintiff's title to certain lands called Cloonboniagh or Cloonboynagh, situate in the barony of Mohill, county Leitrim.

The title is derived under the will of Matthew Nesbitt, dated the 14th October, 1812. This gentleman was the owner in fee of an estate comprising some seventeen townlands, of which the lands of Cloonboniagh formed one townland. By his will he devised all his lands to his only son, Francis Nesbitt, for life, and then to his heirs male, with remainder to the testator's daughter, Elizabeth Nesbitt, and her issue male, she and they and her husband taking the name and bearing the arms of Nesbitt, with remainder to the

testator's other children. By a codicil to the will, dated 30th November, 1821, he devised the lands of Cloonboniagh to one Anne Doyle and her five children, naming them share and share alike during their lives or the life of the survivor of them. The testator died in the year 1823, and his will and codicil were duly proved.

Francis Nesbitt went into possession of all the lands save the townland of Cloonboniagh, and the Doyle family, mentioned in the codicil, went into possession of this. The last surviving member of the Doyles died on the 16th of March, 1905, and thereupon their interest in Cloonboniagh determined, and the testator's estate in this townland following the limitations declared concerning the remaining townlands. Let us see, then, how these devolved. Francis Nesbitt, the testator's only son, went into possession under the will. His estate was an estate in tail male in possession of all the lands save Cloonboniagh, and in tail male in remainder in the latter expectant on the determination of the estate in the Doyles. He had only one son, Francis Henry William Nesbitt.

In 1831 Francis Nesbitt suffered a recovery of all the lands devised by the will, and, so far as that recovery was valid and effectual, the limitations of the will were determined. At the date of the recovery he was tenant in tail in possession of all the lands save Cloonbonaigh; but his estate in the latter was then still in remainder, with the result that the recovery, owing to the absence of a tenant to the praecipe, failed to bar the estate tail there. Hence Cloonboniagh continued subject to the limitations of the will while the main estate passed away. Francis Nesbitt died on the 7th January, 1854, and Francis Henry William Nesbitt died on the 14th October, 1879, without issue, whereupon the next estate in tail male, so far as not barred by the recovery, devolved upon Elizabeth Nesbitt; but this devolution in the circumstances only carried the lands of Cloonboniagh subject to the estate of the Doyles. Elizabeth Nesbitt in the year 1829 married George Hamilton Beresford, and the eldest son of the marriage was George de la Poer Beresford. Elizabeth Nesbitt, otherwise Beresford, died in the year 1847, leaving her son, George de la Poer Beresford, surviving. He then became tenant in tail male of Cloonboniagh, and that estate fell into possession in the year 1905

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by the determination in that year of the Doyle interest; but although he lived until the year 1913, he never went into possession during his life. This omission is explained by a claim made by mortgagees of the Doyle interest to a greater estate in the lands than they were really entitled to.

George de la Poer Beresford, by his will dated the 8th of May, 1911, devised and bequeathed all his real and personal estate to trustees upon trust for sale, and after payment of his debts and legacies to invest the proceeds and pay the income to his wife for life, and after her death to hold the residue in trust for his daughter, the plaintiff in this action, absolutely. By a disentailing assurance, dated 11th July, 1913, and duly enrolled, George de la Poer Beresford disentailed the lands. He died on the 7th October, 1913, and his will was proved on the 6th of February, 1914. The plaintiff claims in these circumstances to be entitled to the lands of Cloonboniagh.

The defendants are the present occupiers of the lands, and, with the exception of James Reynolds, whose case I will deal with separately, hold under tenancies which are good against the owner in fee. The plaintiff cannot, therefore, get the possession. The most she can do is to establish her right to the rents payable under the tenancies. The defendants, however, dispute the plaintiff's right in toto, and their defence is based on non-compliance with the name and arms clause in the will of Matthew Nesbitt.

It will be remembered that the lands were devised to Elizabeth Nesbitt and her issue male, she and they and her husband taking the name and bearing the arms of Nesbitt. It was contended that this was a condition precedent to the vesting of the estate tail, and, as it was never performed, the estate tail lapsed. The plaintiff, on the other hand, says that the clause, if it imposed a condition at all, only made the taking of the name and bearing of the arms a condition subsequent; that the time for the performance of the condition did not commence until the estate tail fell into possession; that the tenant in tail had, if not his whole life, at least a reasonable time for the performance of the condition; and that, in the circumstances of the case, he never having got actual possession or been able to recover any rents during his life, had not lost

the estate tail at the date of the disentailing assurance, and by barring the estate had freed the lands from the condition.

Before deciding on these contentions, I will first observe that the obligation of taking his name and bearing his arms on acquiring the townland of Cloonbonaigh, and that alone, was never in the mind of the testator. He was only thinking of the whole Nesbitt estate, including the family mansion. He wished his name and arms to be borne by the person who would succeed him in that estate. He never contemplated what has actually happened. Be this, however, as it may, I am of opinion that the clause in question does not impose a condition precedent, but only a condition subsequent to the vesting in possession of the estate devised by the will. I arrive at that conclusion for the reasons given by the Court of Appeal in *In re Greenwood, Goodhart* v. *Woodhead* (1.) But in the present case a difficulty arises from the particular circumstances that one portion of the estate devised might under the will have vested in possession at one period, and another portion at another period. The limitation in favour of Elizabeth Nesbitt had only to await the determination of the estate tail of Francis Nesbitt, in the case of all the lands other than Cloonbonaigh, while in the case of this townland it had also to await the determination of the estate of the Doyles. If Francis Nesbitt's estate tail had not been barred, Elizabeth's estate in the lands other that Cloonbonaigh would have fallen into possession on the 14th October, 1879, the date of Francis Henry William Nesbitt's death, while his estate in Cloonbonaigh did not fall into possession until the 16th March, 1905. If, then, the limitations in the will of the entire property had taken effect, would time have run for the performance of the conditions from the 14th October, 1879, or would it have run qua the main portion of the lands as from that date, and qua Cloonbonaigh from the 16th March, 1905? Should it be held that the performance of the condition was severable? I confess that these considerations open up difficulties which I am glad to be relieved from dealing with by another feature in the will.

It is a settled rule of law that a limitation which is capable of taking effect at common law shall not be construed as an

(1) [1903] 1 Ch. 749.

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executory devise, but must take effect as a remainder. On this principle the limitation on the failure of the estate tail of Elizabeth Nesbitt must be construed as a remainder because there is no rule of the common law which prevents it from operating as such. Once we arrive at this conclusion, we are met by another rule of law. I will state this in the language of an eminent text-writer :—"If a particular estate is at its limitation expressed to be defeasible upon breach of a condition, there is an important distinction between cases in which a remainder is limited to commence upon the *defeasance* of the particular estate, and cases in which a remainder is limited, without any reference to the condition, to commence upon the determination of the particular estate. In the former case, an entry made upon the tenant of the particular estate for breach of the condition will destroy the remainder, but in the latter case, the limitation of the remainder makes the condition itself void" (1). Now the present case comes within the second division, because there is no gift over on breach of the condition which would defeat the estate tail of Elizabeth Nesbitt :—the gift in remainder is upon the regular determination of that estate tail ; therefore the condition imposed by the name and arms clause is void.

This makes absolute and indefeasible the estate tail of Elizabeth Nesbitt which devolved upon George de la Poer Beresford, who by disentailing deed became the owner in fee and devised the fee to the plaintiff. I am of opinion that the plaintiff's title to the lands is in this way clearly established.

This title, however, is subject to whatever outstanding tenancies are now vested in the defendants, as is admitted by the plaintiff, and consequently she cannot get relief in the form claimed by the statement of claim. The claim is for a declaration that she is entitled to an estate in fee simple in possession in the lands of Cloonboniagh, and for an order that the defendants do deliver over possession to the plaintiff, and for mesne rates. If I granted this relief, it would be in violation of the defendants' rights under their tenancies, which are still subsisting. The plaintiff's right is, except in the case of the parcel of land in the possession of the defendant James Reynolds, to have a

(1) Challis on Real Property, 3rd ed., p. 81.

declaration that she is entitled to the fee simple of the lands subject to the several tenancies of the defendants which affected the interest of the Doyles, and to the rents which became due as and from the determination of that interest, subject, however, to any question which may arise as to the amount of arrears recoverable.

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James Reynolds, one of the defendants, has not paid rent to any person for more than twelve years before the commencement of this action, and it is admitted that as against him the action fails in toto, and must be dismissed.

There remains for consideration the question of costs. Now, the defendant James Reynolds, is entitled to have the action dismissed against him with costs, and in the circumstances I could not give the plaintiff costs against the other defendants. Possibly if they were the sole defendants they would be entitled to get costs against the plaintiff.

As I must make the plaintiff pay the defendant James Reynolds' costs, I will not be imposing any substantially greater burden by ordering her to pay the costs of the defendants generally, such costs to be taxed as one set of costs.

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1918. May 8, 9.

The defendants (other than James Reynolds) appealed to the Court of Appeal (1).

*Jellett K.C.* and *Price K.C.*, for the appellants :—

The plaintiff is not entitled to relief in this action.

1. The only defendants before the Court are the occupying tenants, and the heir-at-law of Matthew Nesbitt is not a party. "Whenever real estate is to be recovered, or a right is sought to be established, or a charge raised against real estate, it is necessary that the person or persons entitled to the inheritance should be before the Court." Daniel's Chancery Practice, 8th ed., vol. i, p. 189. If the heir-at-law could not be ascertained, a person to represent him could have been appointed under Order XVI, r. 31.

(1) Before SIR I. J. O'BRIEN C., and RONAN and MOLONY L.JJ.

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2. On the true construction of the will of Matthew Nesbitt George de la Poer Beresford never became tenant-in-tail of the lands; the disentailing assurance executed by him had nothing to operate upon, and the plaintiff claiming through him fails in her action. The estate tail limited to Elizabeth Nesbitt and her issue male, "she and they and her husband taking the name and bearing the arms of Nesbitt," was an estate tail special; the words "she and they," &c., form part of the limitation, and the heirs male general of Elizabeth not coming within the express words of the limitation took no estate. The estate tail is in effect limited to her and her heirs by a special husband, which is a form of estate tail special recognized by the law.

In *Elliot* v. *Elliot* (1) a devise of fee-simple estates to a son of the testator and the heirs of his body other than the eldest son was held to create a valid estate-tail passing over the eldest son. Preston (Estates, vol. ii, p. 362) gives as examples of valid estates tail, the limitations of which "may be varied in any manner, according to the agreement of the parties," the limitation of the Crown which settled the royal dignity and powers in the Princess Sophia of Hanover and the heirs of her body, being Protestants; and a gift to a man and the heirs of his body by a woman of the name of Searle: *Page* v. *Hayward* (2). Preston further (at p. 412) gives, as his third example of an estate-tail special, a gift to a man and the heirs of his body begotten "on the body of a person of a particular name." See, also, the anonymous case in 3 Leonard 87; *Studdert* v. *Von Steiglitz* (3); *Magee* v. *Martin* (4); *Pelham Clinton* v. *Duke of Newcastle* (5); *In re Elton* (6). If the words "she and they," &c., do not form part of the limitation, but import a condition, we contend that the condition is a condition precedent, and that as it was never fulfilled no estate was acquired by the heirs of Elizabeth. No doubt the Courts incline to construe such a condition as a condition subsequent, but there is no inflexible rule: *Bennett* v. *Bennett* (7). If the testator had intended Elizabeth to enter into possession, and to have a reasonable time

(1) [1916] 1 I. R. 30.
(2) 2 Salk. 570.
(3) 23 L. R. Ir. 564.
(4) [1902] 1 I. R. 367.
(5) [1902] 1 Ch. 34.
(6) [1917] 2 Ch. 413.
(7) 2 Dr. & Sm. 266.

within which to take the name and arms of Nesbitt, he would have included a gift over in case of her not doing so. The clear intention is that no one should enter into possession unless of the name and bearing the arms of Nesbitt, and the will should be so construed: See judgment of Lord O'Brien C.J. in *FitzGerald* v. *Ryan* (1). *In re Greenwood* (2) is clearly distinguishable, having regard to the conditions there mentioned.

3. The action is barred by the Statute of Limitations. The last member of the Doyle family died on the 16th March, 1905, when the title of George de la Poer Beresford, assuming him to have had title, occurred. He never entered into possession, and no rent was ever paid to him by any of the defendants. Accordingly, the Statute of Limitations would but for this action have run against him on the 16th March, 1917, prior to the hearing of the action on the 1st November, 1917. Had the bringing of the action on the 18th February, 1916, any saving effect? The action as pleaded was not one brought to recover possession of the lands, in which the plaintiff would have necessarily failed, as she could not oust the defendants, who were lawfully in possession as tenants. The Master of the Rolls, in place of dismissing the action, as we submit he should have done, treated the pleadings as amended, and declared the plaintiff entitled to the fee simple, subject to the several tenancies of the defendants. That is a new cause of action, and *Weldon* v. *Neal* (3) shows that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action, which since the issue of the writ have become barred by the Statute of Limitations. [They also referred to *Heath* v. *Pugh* (4).]

*S. L. Brown K.C.* and *Wilson K.C.* (*Sealy K.C.* with them):—

It is impossible to hold that the words in the will "she and they and her husband taking the name and bearing the arms of Nesbitt" are words of limitation. No such estate tail special is known to the law, or to be found in any classification of estates-tail in the books. The vesting of an estate tail in Elizabeth Nesbitt could not have been made dependent on acts to be done

(1) [1899] 2 I. R. 637, at p. 658.
(2) [1903] 1 Ch. 749.
(3) 19 Q. B. D. 394.
(4) 6 Q. B. D. 345.

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by her husband, who took no estate, or by her issue, who only could take per formam doni. The words must imply either a pious desire, which is the construction we put forward, or they import a condition only, which must be a condition subsequent: *In re Greenwood* (1); *Woodhouse* v. *Herrick* (2). Once the estate-tail vested in Elizabeth, it must have descended to her heirs male in the usual way: *In re Hobbs* (3); *Gulliver* v. *Ashby* (4).

As to the form of action, the writ of summons specifically claims a declaration of title subject to the defendants' rights as tenants, which was the relief granted. The suit is one for the recovery of land within the meaning of the Statute of Limitations. In *Walters* v. *Webb* (5) the plaintiff was the heir of a copyholder whose lands had been seized quousque before 1831, and the bill asked that the defendants, the lords of the manor, might be decreed to admit the plaintiff, a proceeding which was held to be an action for the recovery of land within the meaning of the statute 3 & 4 Wm. 4, c. 27. As this action was brought within twelve years from the death of the last member of the Doyle family, the Statute of Limitations has no application. The suit was properly constituted. The plaintiff is entitled to the fee, and only sought a declaration of title and an order to be put in possession of the rents and profits of the lands, because the defendants have been wrongfully withholding payment of their rents. The action could not have been otherwise framed.

*Jellett K.C.*, in reply.

SIR IGNATIUS J. O'BRIEN C.:—

We do not require to reserve judgment in this case. Two main questions arise for our consideration—first, as to the true construction of the will of Matthew Nesbitt, and then as to the application of the Statute of Limitations. Now as to the construction of this will, I have throughout the argument been able to hold but one view. The testator devised to his daughter Elizabeth an estate tail in remainder in these lands, " she and they and her husband taking the name and bearing the arms of

(1) [1903] 1 Ch. 749.
(2) 1 K. & J. 352, at p. 359.
(3) [1917] 1 Ch. 569.
(4) 4 Burr. 1929; 1 William Blackstone, 606.
(5) L. R. 5 Ch. App. 531.

Nesbitt." We must hold, unless the words of the will coerce us to do otherwise, that the testator intended to devise to Elizabeth an estate tail, one which the law would recognize, and not a mere fanciful estate tail of a kind no trace of which is to be found in the authorities up to the present. It has been argued, however, that the words which I have quoted are included in the limitation of the lands to Elizabeth, and that as her heir did not fulfil this fanciful condition, he acquired no estate under the will; that, accordingly, the plaintiff, claiming through him, fails in her action; and that the defendants are entitled to judgment. I cannot agree with the contention. I do not think that by these words the testator intended to impose a condition which would or might affect the devolution of the estate tail limited in the lands. If the words have any effect at all, they were, I think, intended to impose a condition upon those acquiring the estate tail; and I am clearly of opinion that that condition must be held to be a condition subsequent. To hold it to be a condition precedent would be to pre-suppose that the taking by Elizabeth of the estate tail limited to her was made dependent upon the doing of certain acts by other persons over whom she had no control, and who were given no estate by the settlement—a condition so ridiculous that effect could not possibly be given to it. If the condition be, as I hold it to be, a condition subsequent, the law is clear that any person bound by the condition would have a reasonable time for its fulfilment. In the present case George de la Poer Beresford barred the entail in the year 1913, his title having accrued in the year 1905. In any case, I have grave doubts whether an ordinary tenant in occupation or any person other than one claiming under the limitations of the settlement could rely as a defence upon the non-fulfilment of such a condition.

It has been pressed upon us that these words were intended to create an estate tail special such as the law recognizes, namely, an estate tail to Elizabeth Nesbitt and her heirs by a named husband. I cannot, however, adopt this construction, if for no other reason, because of the introduction into the clause of the words "they and her husband," which bring me back to my original difficulty, namely, how it can be possible to make the vesting of an estate tail in the daughter depend upon something

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which is to be done by other persons who themselves are given no estate under the settlement.

I am inclined to doubt very much whether these words which have given rise to this controversy have any legal effect whatsoever; but if they have, I am satisfied that they imposed a condition subsequent only. I am also satisfied that the point raised by the defendants under the Statute of Limitations is met by the decision in *Walters* v. *Webb* (1). The judgment of the Master of the Rolls must be affirmed.

RONAN L.J.—

I agree, and I shall only add a very few observations. The moment I read the will, the difficulty occurred to my mind of giving any legal effect to the words in this clause. "She and they and her husband taking the name and bearing the arms of Nesbitt," because to do so would make the devolution of the estate tail limited in the lands dependent upon the acts of persons to whom no estate whatever was given by the will. The estate tail is given to Elizabeth Nesbitt, and to her alone; the issue take by descent per formam doni; there is no gift to them, and I have never before heard it suggested that the limitation of an estate tail to an ancestor could be accompanied by some condition to be performed by his issue. This seems to me conclusive of the case. If authority is needed, it is to be found in the several classifications of estates tail known to the law contained in Preston on Estates; in Lord Halsbury's Laws of England, and in Challis' Real Property. The matter is clear; you may define who is to be the father, or who is to be the mother; you may define whether the issue are to be male or female, or whether heirs general are to take. But no trace is to be found in the authorities of an estate tail special of the nature suggested here.

The Master of the Rolls seems to suggest in his judgment that when the life estate of the last surviving member of the Doyle family fell in in the year 1905, there might have been some sort of obligation on George de la Poer Beresford, the then heir of Elizabeth, to take the name and arms of Nesbitt. If that was his view, I respectfully dissent. I do not think there was any such

(1) L. R. 5 Ch. App. 531.

obligation on him. Nor am I able to see that any difficulty is caused by the fact that but for the recovery suffered by Francis Nesbitt, Elizabeth's estate in these lands and in the remaining lands comprised in the will would have fallen in at different times. The same question would have arisen as to each estate. But in the result of the decision of the Master of the Rolls I entirely agree. The appeal must be dismissed.

MOLONY L.J.:—

I agree. With regard to the defence raised under the Statute of Limitations the matter stands thus:—The last tenant for life, Matthew Doyle, died on the 16th March, 1905, when the right of the plaintiff's immediate predecessor in title accrued. The action was brought within twelve years from that date, the writ having been issued on the 18th February, 1916. It has been argued, however, that this was not an action for the recovery of land within 3 & 4 Wm. 4, c. 27, s. 1, as amended by the Act of 1874; and that as twelve years had elapsed before the action came on for trial in November, 1917, the Statute of Limitations had then supervened, and the plaintiff was accordingly not entitled to the relief to which she has been declared entitled. This depends on whether the form of action as brought was within the terms of the Act, and I am clearly of opinion, on the authority of *Walters* v. *Webb* (1), and indeed I would have so held independent of authority, that this was an action for the recovery of land; and that this form of action afforded the only way by which the title to the reversion could validly have been ascertained in the circumstances of the present case.

I have nothing to add to what has been said by my colleagues with reference to the main question in the case. It has been argued that this was an estate tail special, and that the words used amounted to a limitation of a valid estate tail to Elizabeth Nesbitt and her heirs male by a husband of the name of Nesbitt, a species of estate tail which it is said is recognized as lawful in the books. When, however, we come to look at the settlement itself, it is impossible to construe the words in that sense, because it is not she and her husband who are to take the name, it is

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"she and they and her husband taking the name of Nesbitt." The words purport, so far as they can, to bring in the heirs, and to limit the estate not to her alone, but to bring in the issue, who do not take by purchase at all. I am clearly of opinion that these words cannot be read as words of limitation; and then the only questions are, can they be looked upon as importing a condition, and, if so, is it a condition precedent or subsequent? or, as suggested by Mr. Brown, are the words expressive merely of a pious wish or desire on the part of the testator that Elizabeth and her issue should bear the family name and arms? While it is undoubted that conditions of this nature may be construed as conditions precedent, the whole trend of authority, both ancient and modern, is, unless the words are coercive, to construe them as conditions subsequent, and I need merely refer to the two cases to this effect cited in the argument: *Woodhouse* v. *Herrick* (1) and *Gulliver* v. *Ashby* (2). These authorities leave no doubt that the condition in the present case must be construed as a condition subsequent. Consequently the decision of the Master of the Rolls was right, and must be affirmed.

Solicitor for the appellants: *James A. Kiernan.*
Solicitors for the respondent: *Maxwell, Weldon, & Co.*

R. ST. J. C.

(1) 1 K. & J. 352. (2) 4 Burr. 1929; 1 William Blackstone, 606.

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Dec. 11.

## IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF ELLEN SHANAHAN AND DANIEL SHANAHAN.

(FOLIO NO. 812/15565. . CO. TIPPERARY.)

*Land Registry—Local Registration of Title—Settlement—Right of residence on farm—Annuity in lieu of right of residence—Burden—54 & 55 Vict. c. 66, s. 45.*

By a marriage settlement executed in 1907 by A, the intended husband, B, the intended wife, and C, a brother of A, it was agreed that if A died without issue, A's farm of lands should become the absolute property of B, and A and B thereby jointly and severally covenanted with C to support, clothe, and maintain him during his life in the residence on the farm, he continuing to work there, and that if he should leave he should receive in lieu thereof an annuity of £15 during his life.

*Held*, that the rights of C were charges on the lands, and that the covenant was rightly entered as a burden on the folio of registration under the Local Registration of Title (Ireland) Act (54 & 55 Vict. c. 66, sect. 45).

APPEAL (1).

By an indenture dated the 26th January, 1907, and made between John Shanahan of the first part, Michael Shanahan of the second part, and the appellant, then Ellen Carty, of the third part, after reciting that the said John Shanahan held portion of the lands of Galbertstown, in the county of Tipperary, subject to an annuity payable to the Irish Land Commission, and that a marriage had been arranged between the said John Shanahan and the appellant, it was witnessed that in consideration of the marriage, and of the sum of £50 paid by the appellant to the said John Shanahan, the parties thereto for themselves, their executors, administrators, and assigns agreed and bound themselves to the following conditions and covenants:—"In case the said John Shanahan should predecease the said Ellen Carty without issue, then the aforesaid lands, together with cattle and chattels thereon, shall vest in and become the absolute property of said Ellen Carty for her own use and benefit, and the said John Shanahan and Ellen Carty do and each of them doth covenant with the aforesaid Michael Shanahan, that they and each of them, their and each of their executors, administrators, and assigns will

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support, clothe, and maintain the said Michael Shanahan in his present residence during his life in the same manner as he has hitherto been accustomed to, and the said Michael Shanahan agrees to work on the farm in the same manner as he has done heretofore, but in case of any disagreement, and the said Michael Shanahan deciding to leave the place altogether, then he is to receive a sum of £15 per year, payable quarterly, during his life, and the said Michael Shanahan hereby admits that he has no claim of any kind in respect of the lands hereinbefore mentioned, or to the cattle and all other chattels now therein or thereon, and if any such claim exists or has existed he hereby expressly releases same."

The marriage between John Shanahan and the appellant was duly solemnized, and John Shanahan was subsequently registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, as limited owner of the said lands of Galbertstown, "subject to the support, clothing, and maintenance of Michael Shanahan, brother of the said John Shanahan, in his present residence during his life in the manner to which he has heretofore been accustomed, provided that he shall work upon the farm as heretofore, or in case of a disagreement, and of the said Michael Shanahan deciding to leave the said lands, then subject to the payment to the said Michael Shanahan of an annuity of £15, payable quarterly, during his life."

John Shanahan died without issue on the 20th October, 1912, whereupon the appellant became entitled to the said lands.

Michael Shanahan continued to reside on the farm for a short time after John Shanahan's death, but subsequently left, whereupon he instituted an equity civil bill against the appellant, seeking to have the said annuity of £15 and all arrears thereof declared well charged on the lands of Galbertstown, and for a sale and consequential relief.

By an order of the County Court Judge made on the hearing of the said equity civil bill, the appellant was given leave to take such proceedings as she might be advised, with a view of having the register of the said lands amended by deleting the words relating to the rights of the said Michael Shanahan.

On the 12th June, 1917, the appellant applied to Mr. Justice Madden for an order that the said words should be deleted from

the folio, and also that a certificate of charge, which had been issued to the said Michael Shanahan, should be sent in to be cancelled, which application was refused with costs. Hence this appeal.

*Hungerford*, for the appellant :—

The folio should be amended, as the settlement contains no charge upon the lands of the rights of residence and maintenance, or of the annuity. Even if there was an implied charge of the former rights, it came to an end when Michael Shanahan elected to leave the lands, and the annuity is secured only by the personal covenant of the appellant, who is now the absolute owner of the lands, and is entitled to be registered as such.

*Carrigan K.C.* and *J. O'Byrne*, for the respondent :—

The rights of the respondent under the settlement are impliedly charged upon the lands. The rights of residence and maintenance clearly are so charged, and if so, the right of the annuity, which is given in exchange, must equally be so. *In re M'Guinness's Contract* (1) ; *Leonard* v. *Leonard* (2). It is the practice to enter the entire covenant as a burden on the register. Browning and Glover, p. 159.

SIR IGNATIUS J. O'BRIEN C. :—

We are clearly of opinion that the order of Madden J. was right. We are asked to make an order that these words should be deleted from the register, on the ground that the rights given by the settlement to Michael Shanahan were not charges on the lands comprised in the settlement. The right of residence clearly was a charge on the lands, and that being so, it is impossible to say that the annuity, which was given in lieu thereof if Michael should leave the farm, was not a charge. The appeal must be dismissed with costs.

RONAN and MOLONY L.JJ. concurred.

Solicitor for the appellant : *L. J. Ryan.*
Solicitor for the respondent : *J. P. Carrigan.*

R. ST. J. C.

(1) 1 N. I. J. 49.
(2) 44 I. L. T. R. 155.

*Powell J.*
1918.
Dec. 9.
1919
Jan. 14.

## In re JACOB, Deceased.
## M'COY *v.* JACOB.

*Will—Specific legacy—Interest—Trust for payment of legacy at a future time—Date from which interest runs.*

A testatrix entitled to receive a sum of £2000, bearing interest at £6 5*s.* per cent., bequeathed the said sum of £2000 to a trustee, to be held by him when received in trust for certain legatees, and the residue of her property to residuary legatees. The interest was paid to the testatrix down to the time of her death. The capital sum of £2000 was subsequently paid to the legatees entitled thereto.

*Held,* that the interest accruing subsequent to testatrix's death should be paid to the legatees of the sum of £2000, and not to the residuary legatees.

Originating Summons.

The facts as follows are taken from the judgment of Powell J.:—

Francis Jacob and Edward Jacob carried on business in partnership in Waterford. On the 2nd November, 1875, an agreement was entered into between them which provided (inter alia) that in order to prevent complication of accounts, and uncertainty of values, and interruption of business by reason of any protracted valuation upon the death of either of the co-partners, the premises and business should thereafter be the property of the survivor upon the terms of his securing to the representatives of him who should first die the fixed sum of £2000 in lieu of his share thereof, and upon his undertaking all the liabilities of the business in manner thereinafter appearing; and the agreement provided that the party so liable to pay the sum of £2000 should pay half-yearly to the person or persons entitled thereto interest thereon, or on such portions thereof as should from time to time remain unpaid, at the rate of 5 per cent. per annum.

On the 12th November, 1881, a new agreement was made between the partners whereby they agreed that the amount due to each in case of death should, until further arrangement, be £3000, with £150 per annum for interest, to be paid as directed in their

wills, and subject to all the conditions of the former agreement except the amount, which was altered as above.

Francis Jacob died on the 30th August, 1905, and by his will he appointed his widow, Octavia Jacob, his executrix and sole residuary legatee, who thus became entitled to the sum payable under the agreement.

On the 5th August, 1910, an agreement was entered into between the said Octavia Jacob and Edward Jacob, the surviving partner, which recited the said respective agreements of the 2nd November, 1875, and 12th November, 1881, and further recited that Octavia Jacob had agreed with Edward Jacob to further modify the provisions of the said agreement, and the agreement then provided that Octavia Jacob should accept and Edward Jacob should pay to her the sum of £2000 as and for the amount to which she was then entitled under the previous agreements and under the will of her husband, Francis Jacob; and provided that Edward Jacob should pay to her in respect of this sum of £2000, or so much thereof as should for the time being remain unpaid, interest at the rate of £6 5*s.* per cent. per annum.

Octavia Jacob died on the 2nd of March, 1916. In her will, dated 12th August, 1910, she recited that at the request of Edward Jacob she had agreed to accept from him the sum of £2000, to be payable in lieu of the sum of £3000, to which she had become entitled under the agreement of the 12th November, 1881. The will then proceeds:—"Now I give and bequeath the said sum of £2000 so agreed to be accepted by me as aforesaid to my trustee, to be held by him when received in trust as to £1000 thereof, for my said husband's nephew, Charles Richard Jacob, now residing in the United States of America; as to £200 thereof for Francis Jacob, son of the said Charles Richard Jacob; as to £250 thereof for William Jacob, son of the said Edward Jacob; as to £250 thereof for Mabel Elizabeth Jacob, daughter of the said Edward Jacob; and as to £300, the balance of the said sum of £2000, to my said husband's cousins, Helen Beal and Marguarita Beal, share and share alike. I declare and direct that the remainder of the property bequeathed to me by my said husband shall fall into and form part of my residuary estate, and shall be disposed of as hereinafter mentioned." She bequeathed the residue of her pro-

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perty in trust for certain residuary legatees, and appointed the plaintiff executor and trustee of her will.

Interest at the rate of £6 5*s.* per cent., as provided by the agreement of the 5th August, 1910, was paid by Edward Jacob to Octavia Jacob down to the date of her death.

On various dates between October, 1917, and October, 1918, Edward Jacob, with the consent of the plaintiff, paid their legacies to the legatee direct; and Edward Jacob undertook to pay such interest on foot of the sum of £2000 as he may be directed by the Court.

The question as set out in the originating summons was as follows:—"Did the bequest in the said will contained in the words and figures following, viz., 'Now I give and bequeath the said sum of £2000, so agreed to be accepted by me as aforesaid, to my trustee, to be held by him when received in trust" [then follow the legacies], "carry interest in favour of the said legatees? If so, did it carry interest at £6 5*s.* per cent. per annum, or at £4 per cent. per annum, or otherwise at what rate and from what dates respectively?"

*Smylie*, for the plaintiff.

*Leet*, for William Jacob, a legatee:—

I am entitled to interest at £6 5*s.* per cent. from the death of the testatrix till date of payment, or, in the alternative, interest at £4 per cent., or, in the alternative, from one year from the death of the testatrix. I am a specific legatee of a portion of the fund of £2000. Where there is a specific gift of property, that gift passes everything incident to the property, including the interest. Whatever interest testatrix herself had in the £2000 she bequeathed to the legatees. She used the words "when received" because the money could not be called in at any prior time. A mortgage debt which cannot be called in for some years carries interest in the interim. The same principle applies to a promissory note, a bill of exchange debitum in presenti solvendum in futuro. Here also we have an interest-bearing subject. Therefore the gift of it carries the interest also. "When recovered" occurs in *Wood* v. *Penoyre* (1), which was a case of legacies to be

(1) 13 Ves. 325.

paid out of money due on mortgage. A specific legacy carries the interest from the date of death. A general legacy carries interest from one year after death: Hawkins on Wills, p. 352; *Kiersey* v. *Flahavan* (1).

*Overend*, for the residuary legatees:—

A legacy payable at a future date carries interest only from the time fixed for its payment: *Lord* v. *Lord* (2). *Wood* v. *Penoyre* (3) was considered in that case and in *Walford* v. *Walford* (4).

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POWELL J. [His Lordship, having stated the facts as above, proceeded]:—

The testatrix has not expressly dealt with the interest, and I have to decide to whom the interest should go.

Statements will be found in many of the judgments of learned judges upon the solution of questions arising under wills, that common sense should, as far as possible, be a guiding principle in the conclusion to be arrived at. If I were to decide this matter according to my views of the proper application of common sense, I should not have much difficulty about it.

This testator recites in her will the agreements entered into between her husband and his brother ascertaining the amount to be paid by the survivor in respect of the interest of the other in the partnership business. She recites her own agreement with the surviving brother, setting out the amount which she is satisfied to accept in respect of this interest of her husband, and she divides the whole of this sum between her husband's nephew, the sons of her husband's nephew, and her husband's cousins, and, with the exception of a legacy to her coachman, she bequeaths the "remainder" of her property to her (own) nephews and nieces, subject to certain wishes expressed in a memorandum. She intended, and so expressed, that her husband's relatives should get this £2000, and I should say, as a matter of common sense, that they should get the interest on it as well, which

(1) [1905] 1 I. R. 45.
(2) L. R. 2 Ch. 782.
(3) 13 Ves. 325.
(4) [1912] A. C. 658.

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accrued after her death and before payment. However, common sense must yield to legal principles if unhappily they are in conflict. I must proceed to see whether they can be reconciled in this case.

The legacies in question are specific legacies. In *Duncan* v. *Duncan* (1) the Master of the Rolls (Sir John Romilly) said:—"I think the distinction between the cases very clear. If a person bequeath a debt which is due to him, that is a specific legacy. It is equally so if he bequeath it to several persons in certain shares and proportions, as in equal moieties or in equal fourths; or if he say, 'I give £1000 out of it to A. B. and the residue to C. D.' In all these cases the legacies are specific. But if he says, 'I give a legacy of £40 to A., and I desire it to be paid out of the debt due to me from B.,' this is not a specific legacy. Testator gives a legacy, and merely points to a fund out of which it is to be found. The question is, whether the testator has given the thing itself, and if that be so, it cannot be treated otherwise than as a specific bequest."

Here it appears to me that the whole sum of £2000 to which the testatrix was entitled under the agreement was segregated, and the debt due to her bequeathed to the several legatees in certain shares and proportions. There is a complete separation of the subject of these specific bequests for the purpose of effecting the gifts, and there is no gift over. I think they are legacies which are segregated and vested in a trustee for the benefit of the objects of the gifts when the event, that is, payment by Edward Jacob, happens. It appears to be well settled that legacies which are specific and vested carry all the income and profits which accrue after the testator's death, and that even in the case of general legacies, where a fund is separated from the general personal estate for the purpose of providing for the future payment of legacies, they carry the income, even although the beneficiaries take only contingent interests. The law on this subject was reviewed by the Vice-Chancellor, in the year 1879, in a case of *Johnston* v. *O'Neill* (2), where (at p. 480) he says:—"It is the general rule that general legacies payable at a future day, even though vested, do not carry interest before the day of

(1) 27 B. 386, at p. 389. (2) 3 L. R. Ir. 476.

payment, except legacies given to a child by a parent or a person in loco parentis. But to this general rule there are exceptions, one of which is, that where a fund is directed to be presently separated from the general personal estate for the purpose of providing for the future payment of certain legacies, it carries the interest accruing up to the time of payment, to the legatees, with the capital sum. In such cases, the rule that the interest follows the capital prevails, and the legatee gets his legacy with its interim accretions. The effect of a direction to set apart the special fund at once, or at some time prior to the day of payment, is to dedicate that fund, with its increase, from the time appointed for setting it apart, to the particular purpose, and to take it out of the general personal estate, without waiting for the arrival of the time of payment."

The cases referred to by the learned Vice-Chancellor go back to the year 1836—*Boddy* v. *Dawes* (1). There is an older case decided in 1727 of *Love* v. *L'Estrange* (2), a decision of the House of Lords. The speeches of the learned lords are not given in the report, but they affirmed the judgment of Lord Chancellor King, and he decided that where a testator by his will gave all his personal estate to trustees until a legatee should attain twenty-four, and from thenceforth in trust for him, his executors, &c., the legatee, having lived till twenty-one, and having died intestate before the age of twenty-four, at the testator's death had a vested interest, and that the age of twenty-four was only directory as to the time of payment. Coming to more recent authorities:—In *Long* v. *Ovenden* (3), which was decided in the year 1880, the year after the decision of the Vice-Chancellor just referred to, the Master of the Rolls (Sir George Jessel) in dealing with the question as to what became of the income of the share of a legatee (page 694) said: "The first question to be considered is, what is the capital? It is part of an ascertained trust fund. It is as specific a thing as you can well have. Treating the well-settled doctrine of a gift of a specific legacy as analogous, we find that if you give a specific legacy with a postponed enjoyment, it carries intermediate income. If £10,000 consols, standing in the name of the testator and so described, is given to A. on his attaining

(1) 1 Keen, 362. (2) 5 Bro. P. C. 59. (3) 16 Ch. D. 691.

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twenty-one, A. on attaining twenty-one gets the £10,000 consols as from the testator's death. That is settled because it is considered to be severed at the death from the rest of testator's estate." This passage in the judgment of Sir George Jessel has been criticized as being too wide, but Mr. Justice Chitty, in his judgment in *Clements* v. *Pearsall* (1), to which I will refer later on, points out that the learned Judge clearly intended to deal with a case of postponed enjoyment only and not postponed vesting, and says that in that case the illustration he gave would be correct; and in *Lambert* v. *Lambert* (2) the Lord Chancellor (Sir Samuel Walker), referring to this judgment, says there is also a general statement attributed to Sir George Jessel at page 694 which goes too far, but is quite correct if applied to the facts to which he meant it to be applicable. The judgment of Sir George Jessel proceeds: "Indeed, as regards general legacies, where there is a severance complete as from the death, they carry interest from the death, and not from the end of twelve months, on this principle, that they are severed and taken away and distinguished from the general property of the testator." And later on: "The same principle would follow, I presume, if a man gave a flock of sheep to be delivered to A.B. on his attaining twenty-one. I suppose the intermediate increase of the flock would pass. Nobody could say that the lambs which were born in the meantime fell into the general estate of the testator, and so I suppose it would be in any other case where income or an other accretion accrued to the specific article, whether what wa given was a chattel or a security." It is worthy of remark that the case of *Lord* v. *Lord* (3), relied upon by Mr. Overend, was cited by counsel for the plaintiff, but Sir George Jessel does not appear to have considered that the decision was applicable to the case before him.

*Wood* v. *Penoyre* (4), which was relied upon by Mr. Leet, does not appear to have been referred to, presumably because in that case the legacy was not specific but demonstrative, and Sir George Jessel, dealing with the law as regards general legacies, says that where there is a severance complete as from the death, they carry

(1) [1894] 1 Ch. 665.
(2) [1910] 1 I. R. 280.
(3) L. R. 2 Ch. 782.
(4) 13 Ves. 325.

interest from the death, and not from the end of twelve months, as in *Wood* v. *Penoyre* (1), but the decision in *Wood* v. *Penoyre* (1) shows that the date upon which the fund out of which the legacies are payable is realized is not necessarily the date from which interest becomes payable to the legatees. The legacy in that case was admitted by counsel for the plaintiff not to be specific. It was, as put by Lord Haldane in a case to which I will refer later on, in describing the class of legacy he was dealing with at the time, a demonstrative legacy which is simply "a general legacy with the quality attached to it that it is directed to be paid out of a specific fund." The opinion of the Court in *Wood* v. *Penoyre* (1) was that the words "when received" did not suspend or postpone the right to interest.

In *Guthrie* v. *Walrond* (2) Lord Justice Fry (then Mr. Justice Fry) said:—"I think the law is plain that when a specific legacy is given on the happening of a contingency, the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to his next-of-kin, as the case may be, but when a specific legacy is vested at once in the legatee, and the enjoyment only is postponed until the happening of the contingency, the interim interest and accretions go to the legatee."

In the present case I think that these specific legacies were vested, and that the enjoyment only was postponed until the happening of the event—namely, the payment by Edward Jacob, and if one of these legatees died before the money had been paid by Edward Jacob, I do not think that the legacy of the person so dying would fall into the residue of the testator's estate, or go to his next-of-kin, but would go to the legal representative of the legatee so dying.

In *Clements* v. *Pearsall* (3) Mr. Justice Chitty says: "Where a specific legacy is segregated from the mass of the testator's estate to go on a contingency, it carries with it all accretions to the contingent legatees on the happening of the contingency." He refers to the passage in the judgment of Sir G. Jessel in *Long* v. *Ovenden* (4), to which I have already adverted, and

(1) 13 Ves. 325.
(2) 22 Ch. D. 573.
(3) [1894] 1 Ch. 665.
(4) 16 Ch. D. 691.

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goes on say: "In the present case there has been a total segregation: first the legacy is separated from the mass of the testator's estate, and then it is given to trustees for the benefit of the contingent legatees upon distinct trusts." In the present case I think the fund out of which these legacies are payable is separated from the remainder of the testator's estate and given to the trustee for the benefit of the legatees upon a distinct trust to pay same when received.

In *Shaw* v. *Marten* (1) a testatrix having under her marriage settlement a general power of appointment over a sum of £5000, and certain sums comprised in the first schedule thereto, appointed that the trustees should stand possessed of the sum of £5000, and "of such portion of the stocks and securities comprised in the first schedule of the said indenture as shall, with the sum of £5000 of the securities representing the same, make up the sum of £9000" in favour of certain appointees. It was held that the appointment was a specific gift of a portion of the stocks and securities, and that the appointees were entitled to the interest on the whole £9000 from the death of the testatrix. It was argued for the appointees that this was a specific gift of £5000, and of so much of the securities in the first schedule as were necessary to make up £9000, and that, therefore, the income arising from these funds was payable to the appointees from the date of the death of the testatrix; that it was a specific gift of a severed fund, and could not be treated as a general legacy. It was argued on behalf of the persons entitled in default of appointment that it was simply a legacy to come out of a particular fund, and that no interest was payable to the legatees until a year after the death of the testatrix; that it was a gift of a definite sum, with directions as to the method of raising it, and that the utmost that the appointees could get was interest on the £5000 from the death of the testatrix. But Mr. Justice Byrne was of opinion that both the £5000 and "such part of the securities comprised in the first schedule as should, with the sum of £5000, make up the sum of £9000," were specific gifts, although the testatrix had left it to the trustees to determine which part of the whole specific fund should be attributed to this purpose, and decided that in the

(1) [1901] 1 Ch. 370.

result the income of the £5000, or of the securities then representing the same, and of so much of the other securities as the trustees should appropriate to make up the £9000, went from the date of the death of the testatrix to the appointees. [His Lordship next referred to *Courturier* v. *Shea* (1), and proceeded]:—

The latest case that I can find which gives one assistance is the case of *In re Eyre, Johnston* v. *Williams* (2). In that case, at p. 355, Younger J., says:—"Now segregation sufficient for the purpose in hand may, as in *In re Clements* (3), be effected by a direction in a will that the fund shall be vested in trustees for the benefit of the contingent legatee." I think that on the true construction of the will of Octavia Jacob the £2000 is vested in the plaintiff as trustee for the benefit of the legatees upon trust, when he receives the £2000, to pay the legacies.

Mr. Overend relied strongly on *Lord* v. *Lord* (4). That was a case with very special circumstances, and turned largely on the construction of the terms of the will in question. The legacies were payable "out of a fund" not capable of immediate realization. The Attorney-General, counsel for the legatee, relying on *Wood* v. *Penoyre* (5), claimed interest to run from a year after the death of the testator. On the other hand, Sir Roundell Palmer, for the respondent, contended that the gift was a gift in futuro and not a present legacy. He did not quarrel with the decision in *Wood* v. *Penoyre* (5), because in that case there were present words of gift, but pointed out that in *Lord* v. *Lord* (4) the fund was contingent as well as reversionary. In these circumstances, the Court decided that interest was not payable until certain litigation ended, upon the result of which apparently depended whether or not there would ever be a fund to pay the legacy. Sir George Turner in the very first line of his judgment says that it is a question on the construction, and proceeds to construe it with the greatest care. He distinguishes the words of the will in question from the words of the will in *Wood* v. *Penoyre* (5), and in addition says there was this great distinction between *Wood* v. *Penoyre* (5) and *Lord* v. *Lord* (4), that at the

(1) [1907] 1 Ch. 470.
(2) [1917] 1 Ch. 351.
(3) [1894] 1 Ch. 665.
(4) L. R. 2 Ch. 782.
(5) 3 Ves. 325.

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time when this will was made there was no certainty that the property referred to would ever come into possession, but in *Wood* v. *Penoyre* (1) there was no such doubt.

Lord Cairns in the opening lines of his judgment says that the question is one purely of construction of the words used by the testatrix; and although he lays down propositions regarding the date from which interest on legacies is payable, he is dealing with a particular class of legacies, and I certainly do not understand him to include in his proposition the class of legacy with which we are dealing here, or to intend to differ from the views of Sir George Jessel and other eminent judges as stated by them in cases which were conversant with a class of legacy with which the distinguished Lord Justice was not dealing, and which cases were apparently not even cited in the argument. *Lord* v. *Lord* (2) was referred to in the case of *Walford* v. *Walford* (3). [His Lordship referred to the judgment of Lord Haldane, and proceeded]:—

It will be observed that in this case Lord Haldane was dealing with a demonstrative legacy, and he points out that if the trust fund had disappeared, Miss Walford's legacy would have become payable out of such residue as her brother left behind him, along with any other legacies he might have given, because it was a demonstrative legacy which was a general legacy with a quality attached to it that it was directed to be paid out of the specific fund, and if there was a shortage of assets, or if the fund disappeared, it had the advantage over the specific legacies that it was still payable in virtue of its quality as a general legacy out of testator's residue, along with other general legacies. And then, in reference to the principles of law affecting this class of legacy, he quotes with approval the judgment of Lord Cairns in *Lord* v. *Lord* (2). But if I am right in my view as to the nature of the legacies in the present case, they stand upon a different footing. They are not demonstrative legacies, and if the fund out of which they were payable disappeared, the legatees would get nothing. They would not be payable out of the testator's residue. At p. 664 of Lord Haldane's judgment in *Walford* v. *Walford* (3) the following passage occurs:—"My Lords, it may be in this case, if the testator had had his attention called to

(1) 3 Ves. 325. (2) L. R. 2 Ch. 782. (3) [1912] A. C. 658.

the point, he would have expressed himself differently, and have said, 'I do not intend my sister to have the reversionary legacy, or claim interest upon it, until the falling in of the reversionary fund.' That may be; but, in my opinion, courts of justice are precluded from entering into such speculations. They are confined, and rightly confined, to applying common sense to the words which the testator has used in his will, read as a whole. If within that you can spell out an intention such as I have referred to, well and good. If not, you must not supply it by any conjectures as to what the testator would probably have said if his attention had been called to the point on which it was desirable that he should say something."

Applying these words to the present case, I say that it may be that if the testatrix had had her attention called to the question of interest, she would have said, "There is no necessity to deal with the question of interest because my brother-in-law, Edward Jacob, will pay this sum of £2000 when it is demanded from him," and I think, looking at the dates, and the necessity to correspond with the legatees abroad, that it is very likely that he did so. But I am precluded from entering into such speculations, and I am glad to think that if I am right in my view no injustice will be done to any person.

The question put to me must be answered in the following manner:—The bequest in the will of £2000 referred to carries interest at £6 5*s.* per cent. per annum from the date of the death of Octavia Jacob to the dates of the respective payments.

Solicitors for the plaintiff: *Dobbyn & M'Coy.*
Solicitors for William Jacob: *A. & L. Goodbody.*
Solicitor for the residuary legatees: *Ernest S. Lowe.*

D. M. S.

*Ross J.*
1919.
Feb. 14.

## IN RE THE CONGESTED DISTRICTS BOARD, AN OWNER OF LAND.

(FOLIOS 353/10581, 440/10919, AND 1255, Co. KERRY.)

*Land Registry—Burden—Entry on Register—Lands conveyed in fee simple—Price payable by instalments and charged on the lands—Covenant against alienation, etc.—Repugnancy—Practice—Reference to the Court by the Registrar—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *sect.* 14, *sub-s.* 2; *s.* 45, *sub-s.* 1 (*k*).

The Congested Districts Board purchased for cash certain lands, subject to Land Commission annuities, which the Board redeemed out of their own funds. Subsequently the Board conveyed the lands to four purchasers, the purchase-moneys with interest to be paid by instalments extending over sixty-eight and a half years. Each purchaser charged his holding with the payment of the instalments, and covenanted that he would not, so long as any of the purchase-money remained unpaid, alienate, sub-divide, or sub-let his holding or any part thereof without the Board's consent.

*Held*, that the covenants referred to were not repugnant to the estates conveyed, and should be entered on the register.

The rule of law which avoids restrictions inconsistent with the estates to which they are annexed, and the limitations to the rule, discussed.

QUESTION referred to the Court under sect. 14, sub-s. 2, of the Local Registration of Title (Ireland) Act, 1891.

By four deeds of conveyance, dated 9th April, 1918, the Congested Districts Board—the registered owners of the land—conveyed the hereditaments therein described to four persons for the consideration therein mentioned. The deeds recited that the Board agreed to accept payment of the purchase-moneys by instalments, and the respective holdings were conveyed to each purchaser subject to and charged with the payment to the Board of the respective purchase prices with interest at the rate of £3 5*s.* per cent. per annum, by the annuities payable for sixty-eight and a half years in the deeds set forth, and subject to the covenants by the respective purchasers therein contained. Each purchaser charged the holding transferred to him with the payment to the Board of the half-yearly instalments of the annuity, and covenanted with the Board that he would not subdivide or sublet the holding or any part thereof, save with the consent in

writing of the Board, so long as any portion of the purchase-money should remain unpaid, and would not without the like consent sell or alienate the holding during the like period. The Board have power of sale if default be made in payment of any one instalment for forty days after the same shall have become due. The lands sold were purchased by the Board for cash in 1903, and were then subject to Land Commission annuities, which were redeemed by the Board out of their own funds.

The Registrar being in doubt whether the restrictive covenants contained in the deeds should be entered on the register as burdens affecting the lands, made the following order:—

"Whereas the said Board being the owner of the lands comprised in the said Folios by deed dated the 9th April, 1918, transferred portion of the lands in Folio 353/10581 containing 66A. 1R. 10P. to a purchaser, and by deeds of the same date transferred portions of the lands in Folio 440/10919 containing together 86A. 1R. 22P. to purchasers, and by deed of the same date transferred the lands in Folio 1255 to a purchaser. And whereas the deeds of transfer contain certain restrictive covenants on the part of the purchasers. And whereas the registrar entertains a doubt as to whether the said covenants should be entered on the Register as burdens affecting the lands so transferred, now it is ordered that the matter in doubt be referred to the Court.

"(Signed), R. MANDERS, *Registrar*."

*Arthur Meredith K.C.*, for the Congested Districts Board:—

The covenants are not repugnant to the grant. The deed of conveyance is in substance a grant and a mortgage. The covenants are applicable to the latter (i.e. the mortgage), not the former (i.e. the grant), and there is thus no repugnancy. They are restrictive obligations imposed by an owner in fee simple on his own property, prohibiting certain acts on his part without the consent of his mortgagee during the continuance of the mortgage, and would be thus enforceable against a purchaser with notice: *Tulk* v. *Moxhay* (1). I submit they should be entered on the register.

*Cur. adv. vult.*

(1) 2 Phillips, 774.

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*In re* THE CONGESTED DISTRICTS BOARD.

Feb. 14.

Ross J.:—

The matter I have to deal with arises on a case stated by the Registrar of Titles, pursuant to sect. 14, sub-s. 2, of the Local Registration of Title (Ireland) Act, 1891. The question of law is whether the restrictive covenant contained in certain deeds of conveyance and charge should be entered on the register as burdens affecting the lands.

[His Lordship having stated the facts, proceeded as follows:]

If the covenants are legal and binding, it is plain that they ought to be registered as burdens under sect. 45 (par. *k*). The only question that arises is whether these covenants are inoperative and bad because they are repugnant to the estate in fee simple conveyed. This introduces us into a field of controversy in which the opinions of eminent judges and text-writers have been acutely opposed. The general rule of law is that conditions or restraints inconsistent with and repugnant to any estate to which they are annexed are absolutely void. For instance, conditions that property should not be charged, or that the rents should not be raised, or prohibiting curtesy or dower, or in the case of an estate tail prohibiting the power to bar it, would be repugnant to the nature of the estate conveyed and void.

Are there any exceptions to this rule of law? I think it must be admitted that there are.

We find in Littleton (1), after the section stating the rule, the following:—"But if the condition be such that the feoffee shall not alien to such a one . . , which condition do not take away all power of alienation from the feoffee, then such a condition is good." Nobody knows how this exception arose. The same is stated in old books of the highest authority, like Sheppard's Touchstone. Mr. Joshua Williams in his work on Settlements of Real Estate says:—"There is nothing contrary to the policy of the law in a condition which imposes merely a partial restraint on the power of alienation." Mr. Preston holds that the restraint is good if limited to a particular period of time, provided that period does not trench on the law against perpetuities.

(1) Co. Litt. 223 *a*.

In one of the oldest cases, *Daniel* v. *Ubley* (1), the majority of the Court held that the devisee might have given her a fee simple, conditional to convey it to any of the sons of the devisor. That means that it was limited, and she could not convey it to anybody else. Then we have in the case of *Doe* v. *Pearson* (2) a condition only permitting alienation to a particular class of persons "sisters or their children," and Lord Ellenborough and the judges of the Queen's Bench held this a valid condition in the year 1805. In 1853 the matter came before Sir John Romilly: *Attwater* v. *Attwater* (3). There the devisee was prohibited from selling his estate out of the family, but if sold at all, it must be to one of his brothers. It seems hard to distinguish between these two cases; but Sir John Romilly says that, notwithstanding *Doe* v. *Pearson* (2), the condition is repugnant to the estate given, and therefore bad.

In the year 1875 Sir George Jessel, *In re Macleay* (4), decided that the condition was good in a case where there was a devise to a brother on condition that he never sells out of the family. Sir George Jessel says:—"You may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individual, or you may restrict alienation by restricting it to a particular time." Then we come to the case of *Rosher* v. *Rosher* (5), decided in 1884, in which a testator devised his estate to his son in fee, provided that if he desired to sell it in the lifetime of the testator's wife she should have the option to purchase it for £3000, the real selling value at the date of the will being £15,000. Mr. Justice Pearson held that the proviso amounted to an absolute restraint on alienation during the life of the widow, and that it was void at law. There cannot be much doubt about the correctness of the decision; but the importance of the case is that the learned Judge proceeded to criticize the earlier decisions, and in particular the observations of Sir George Jessel. He went on to question the possibility of applying the principle of the exception to future cases, and deplored the judicial departure from the original plain and intelligible rule. There the matter rests, and

(1) 1 Sir W. Jones, 137.
(2) 6 East, 173.
(3) 18 Beav. 330.
(4) L. R. 20 Eq. 186.
(5) L. R. 26 Ch. D. 801.

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the outcome of it all is that conditions imposing a partial restraint on alienation are not per se contrary to the policy of the law; but the limits of the validity of such conditions are not defined by the existing authorities either in this country or in the United States, where the question has been discussed. I doubt if they can be defined. What, then, is the duty of the Court? I know that it is not always a question of pure law.

If there be a condition that if you alienate you must alienate to a certain person or a class, and it turns out that either the person or the class is practically unable to purchase the property, the Court may then infer that the object of the testator or settlor is to render the property inalienable, and the condition may be treated as wholly void. If the condition gives an option to somebody to purchase at a wholly inadequate price, as in *Rosher* v. *Rosher* (1), the Court may draw a like inference, and treat the condition as void and repugnant. It then comes to this, that the condition is bad if in all the circumstances of the case it is unreasonable and intended to prohibit alienation. Applying this to the present case, we find that the purchase price is not to be paid in cash at once. It is to be paid within a certain period of sixty-eight and a half years in instalments sufficient to keep down the interest and pay off the principal within the period. The money is public money administered by the Congested Districts Board. The Board is responsible to the State for the due payment of the purchase-money and interest. The land is the security during the period. If unrestricted subdivision, subletting, or alienation is permitted, the security may become valueless, and the money be lost.

In the circumstances of this case I think the conditions in no way unreasonable, and therefore not repugnant to the nature of the estate conveyed. It would certainly be a strange anomaly if in a sale by the Land Commission the same conditions for the protection of the public money should be held binding; but when the sale takes place under the Congested Districts Board, these conditions should be held void. I therefore answer the question in the affirmative.

Solicitor for the Congested Districts Board: *John T. O'Connor.*

T. C. T.

(1) L. R. 26 Ch. D. 801.

## TITUS L. SWAN *v.* MILLER, SON, AND TORRANCE, LTD. (1)

*Ross J.* 1918. June 19, 27.

*Appeal.* 1919. Jan. 13, 16. Feb. 3.

*Specific performance—Offer—Acceptance—New term—Principal and agent—Statement by agent to principal—Evidence—Statute of Frauds, s. 4.*

The defendants, who held premises in Belfast under a lease for 999 years at a yearly rent of £35, constituted H. their agent to sell the premises, and they arranged with him that the sale should be carried out by granting to the purchaser for the sum of £4750 a new sub-lease of the premises subject to an annual ground rent of £50. H. thereupon communicated to C., an authorized agent of the plaintiff, the defendants' willingness to sell the premises for £4750 subject to an annual ground rent of £50, but C. and his principal, the plaintiff, were left under the impression that this £50 rent was the rent payable by the defendants under a subsisting lease, and were unaware that the subject-matter of the sale was a new sub-lease to be created subject to that rent. Subsequently C., on the 17th November, 1917, sent a telegram to H., offering, on behalf of his principal, £4750 for the premises, but making no reference to the £50 rent. H., on the 19th November, having in the meantime communicated with the defendants, wrote to C. stating that the defendants had wired him accepting the offer of £4750, "plus £50 annual ground rent." On the 20th November H. wrote to the defendants stating that the plaintiff had called on him that day "to say he had bought the premises at £4750 plus £50 ground rent," etc. On the same day the plaintiff forwarded for signature by the defendants a formal proposal for the purchase of the premises "held for a term of 999 years at the yearly ground rent of £50 for the price or sum of £4750," but the defendants by letter to H. on the 22nd November definitely declined the offer, and refused to proceed further with the sale.

In a suit for specific performance by the plaintiff, *held* by Ross J. that, on the correspondence, taken as a whole, there was a binding agreement for the sale of the premises, and that the requirements of the Statute of Frauds had been complied with.

*Held*, by the Court of Appeal (Ronan and O'Connor L.JJ., Sir J. Campbell C. diss.), that the plaintiff was not entitled to a decree for specific performance; that the letter of the 19th November from H. to C. was not an unconditional acceptance of the offer contained in the telegram of the 17th November from C. to H., by reason of the inclusion of a new term, namely, the payment of £50 ground rent; and that, if the said letter of the 19th November could be treated as constituting a new offer, capable, if accepted by parol, of being enforced against the defendants as being the parties to be charged, the letter of the 20th November from H. to the defendants (if admissible in evidence at all) afforded no evidence against them of a parol acceptance by the plaintiff of such new offer.

*The Solway* (10 P. D. 137) dissented from.

(1) In the Court of Appeal before SIR JAMES CAMPBELL C. and RONAN and O'CONNOR L.JJ.

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ACTION.

The plaintiff was a member of the firm of Messrs. George Bolton & Co., carrying on business in Belfast, and the defendants were a limited company, having its registered office in London. The plaintiff in the statement of claim alleged that the defendants were "the owners of leasehold premises situate in Maxwell Street, in the city of Belfast, held for a long term of years, and subject to the yearly rent of £50, and in the occupation of Messrs. Henry & Co. under a sub-tenancy, which will terminate on 1st November, 1918"; and that "by a telegram, dated the 17th November, 1917, the plaintiff, being aware of the particulars of the said premises by his duly authorized agent, Francis R. Crotty, offered to the defendants to purchase the said premises in Maxwell Street, Belfast, at the price or sum of £4750, and the defendants, through their duly authorized agent, John W. A. Hamilton, duly accepted the said offer by letter, dated the 19th November, 1917"; and he claimed specific performance of the said agreement.

The defendants by their defence traversed the several averments in the statement of claim, and pleaded that the 4th section of the Statute of Frauds had not been complied with.

The defendants held the premises in question in this action under a lease for 999 years, subject, in conjunction with other premises held under the same lease, to a rent of £35; and at the date of the alleged agreement for sale the premises were in the possession of Messrs. Henry & Co. under a sub-tenancy from the defendants which expired on the 1st November, 1918.

As a result of correspondence which took place between the defendants and one J. W. A. Hamilton, who had formerly been connected with the defendants' business in Belfast, Hamilton was appointed the defendants' agent to procure a purchaser for the premises; and it was arranged between them that the proposed sale should be carried out by the granting to a purchaser of a new sub-lease of the premises for a long term, subject to a rent of £50, which rent Hamilton suggested to the defendants could be subsequently sold; and it was further arranged that the price to be charged for the sale of the sub-lease, subject to the £50 rent, should be £4750, of which sum £250 was to represent commission on the sale.

Hamilton subsequently got into communication with one F. R. Crotty, an estate agent in Belfast, who, it was admitted, acted as the authorized agent of the plaintiff, and the terms on which the defendants were willing to sell the premises were intimated by Hamilton to Crotty; but neither the plaintiff nor Crotty was aware, as they each admitted on cross-examination, that the £50 rent was to be a new rent in respect of a sub-lease to be carved out of the subsisting leasehold interest, but were left by Hamilton under the impression that it was the rent payable in respect of the subsisting lease, as was subsequently pleaded in the statement of claim; and at no time was the period of the new lease or the date of its commencement agreed upon or discussed.

On the 17th November, 1917, Crotty, by the direction of the plaintiff, sent a telegram to Hamilton as follows:—

Offer you £4750 for Maxwell Buildings. Crotty.

In reply Hamilton wrote to Crotty on the same day:

I received your wire, "offer you £4750 for Maxwell Buildings," which I forwarded to my London firm, advising them to take and wire acceptance. Ground rent is £50 per annum, as stated, but other particulars you can verify.

On the same day Hamilton sent a telegram and also a letter to the defendants, intimating to them the fact of Crotty's offer. On the 19th November the defendants sent a telegram to Hamilton as follows:—

Accept four thousand five hundred net plus fifty pounds ground rent.

And they confirmed the telegram by letter on the same day. On receipt of this telegram on the 19th November Hamilton wrote to Crotty:—

Messrs. Miller, Son, & Torrance, Ltd., London, have wired me, accepting your offer of £4750 (four thousand seven hundred and fifty pounds), plus £50 annual ground rent, for building at present tenanted by Messrs. Henry & Co., Maxwell Street.

On the 20th November, 1917, Hamilton wrote to the defendants two letters regarding the sale, in the first of which he stated:—

Mr. Swan . . . called with me to-day to say he had bought Henry's factory at £4750, plus £50 ground rent, and thanking me for the information I had given him, and asking me to arrange with Mr. Henry to see through the factory before he signed the agreement, etc.

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With the second letter Hamilton forwarded to the defendants the following document from the plaintiff, which he stated had been handed to him that evening for signature by the defendants:

Belfast, 20*th November*, 1917.

Gentlemen,—I propose to purchase from you the premises known as No. 10 Maxwell Street (at present in the occupation of Messrs. Henry & Co.), and held for a term of 999 years at the yearly ground rent of £50, for the price or sum of four thousand seven hundred and fifty ponnds (£4750); £350 to be paid as a deposit and the balance on the 1st May, 1918, when sale shall be completed and possession handed over. You to make good title to the premises, and I am to get the property free from all encumbrances. All head rent and taxes shall be paid or apportioned up to the date of completion. It is understood that the present tenancy does not expire until the 1st November, 1918, but you will undertake to give vacant possession on that date.

J. L. SWAN.

Witness—Leslie Crotty.

Messrs. Miller, Sons, & Torrance, Ltd., London.

On the 22nd November, 1917, the defendants wrote to Hamilton as follows:—

Your letter of the 20th inst. and enclosure from (signed J. L. Swan) on behalf of Messrs. Bolton & Co. only arrived during this morning, and as the details of the agreement are not in any sense satisfactory as to payment, and as to the present tenant, we definitely decline offer, and consider proposal at an end. I may add that since receiving your letter Mr. Henry himself has called, and as a result of our interview we have decided to accept his offer.

Further correspondence took place between the parties, in the course of which the plaintiff, Crotty, and Hamilton insisted that there was a binding agreement for the sale of the premises to the plaintiff; but as the defendants adhered to their position, this action was instituted on the 19th December, 1917.

At the hearing of the action, before Ross J., on the 19th June, 1918, the entire correspondence, which had been disclosed on discovery, was read without objection by either side. No parol evidence was given on behalf of the defendants.

*Serjeant Matheson*, *S. L. Brown K.C.*, and *E. J. M'Kean*, for the plaintiff.

*Jellett K.C.*, *H. Wilson K.C.*, and *H. Thompson*, for the defendants.

Ross J. :—

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June 27.

This is a suit for specific performance of an agreement in writing, which is to be found in certain correspondence that passed between the parties or their agents.

The defendants, who reside in London, hold under a lease for 999 years the premises in question, situate in Maxwell Street, Belfast, now in the occupation of Messrs. Henry & Co., under a sub-tenancy which will terminate on 1st November, 1918.

The defendants' firm had formerly carried on business in Belfast, and Mr. J. W. A. Hamilton had been connected with the firm for many years. The defendants had informed him of their willingness to sell the premises for £3000, with £50 ground rent. Mr. Hamilton wrote stating that property was selling well in Belfast, and that £3000 was too little. He suggested their putting it into his hands for a time, and that he would do his best to get it sold. The lease contained two sets of premises: one known as Antrim premises; and the other as Henry premises. The rent reserved in the lease was £35. The Antrim premises had been sold subject to a ground rent of £60; that is to say, the transaction took effect by way of creating a sub-tenancy in the purchaser. He suggested a similar method in dealing with the Henry premises, and that a sub-tenancy should be created in the purchaser, at a rent of £50. The two so-called ground rents would amount to £110; and when the rent of £35, reserved by the lease, was deducted, there would remain a profit rent of £75, which Mr. Hamilton suggested could be sold for about £1500. He suggested that the firm should have no dealings with Henry, the tenant, behind his back; that he, Hamilton, would communicate with Henry, and if he did not get a sufficient offer would put the property in the market.

It is now admitted that the defendants constituted Mr. Hamilton their agent, with full authority, not merely to negotiate, but to sell the premises to a purchaser. They also employed another agent, the firm of Messrs. Graham & Carson, with the like authority. Mr. Hamilton seems to have had some objection to deal with Henry, and in a letter to the defendants

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of 8th November, 1917, he suggested that Messrs. Graham & Carson should deal with Henry.

He further informed the defendants that he had offered the premises to a firm for £4500, and £50 ground rent. In the correspondence between Mr. Hamilton and the defendants it was definitely settled that the price should be £4725, and £50 ground rent, it being understood that £4500 net should go to the defendants, and £250 for commission. Through a friend of Mr. Hamilton the matter and the terms of the proposed sale were brought to the knowledge of Mr. Crotty, an estate agent in Belfast. Through him they were communicated to the plaintiff, Mr. Swan. Mr. Hamilton had not explained to Mr. Crotty that the £50 ground rent was not the rent reserved in the lease. All he knew was that it was the immediate rent to be paid by the purchaser to somebody, and that also was the understanding of the plaintiff. On the morning of 17th November, 1917, the plaintiff communicated with Mr. Crotty by telephone, and learning that he was starting for Dublin by train, met him at the railway station. He told Mr. Crotty that he would give £4750 for the Maxwell Street premises, and requested him to communicate the offer to Mr. Hamilton. Mr. Crotty dictated a telegram, read it, and gave it to the plaintiff to send. The telegram so sent is as follows:—

To Hamilton & Co., Maxwell Street, Belfast,

Saturday, 17th November, 1917.

Offer you £4750 for Maxwell Street premises—Crotty.

Mr. Hamilton, on receipt of the wire, telegraphed as follows:—

To Torrance, Cent. London. 17th November, 1917.

Offer received, four thousand five hundred pounds net; writing—Hamilton.

Everybody knew that the subject of the offer was the factory in Maxwell Street, Belfast, subject to £50 ground rent, but the ground rent was not mentioned in either telegram. That same day Mr. Hamilton wrote to Mr. Miller, a member of defendants' firm, repeating the wire. The letter contained these words: "I take it his" (that is Crotty's) "commission is £250, and your amount, £4500, which I think a good offer, with, of course, £50 ground rent," and concludes, "so wire me Monday morning,

if I may accept on your behalf £4750, less £250 for Mr. Crotty, or if he accepts less commission, that is his affair, ground rent, £50." On the same day the defendants wrote to Mr. Hamilton.

We have just wired, accept £4500 net, plus £50 ground rent; and, if your Mr. Crotty has sold for £4750, he gets £250. Of course we know nothing of the bona fides of the party offering, but that you must be responsible for. With this definite offer, I must now write to tell Graham and Carson. As soon as possible let me have particulars, so that our solicitors can get into touch with theirs.

Mr. Hamilton replied in a letter of 20th November, in which he says:—

Mr. Swan, of Messrs. George Bolton & Co., called with me to-day to say he had bought Henry's factory at £4750, plus £50 ground rent, and thanking me for the information I had given him, and asking me to arrange with Mr. Henry to see through the factory before he signed the agreement, &c.

From this letter it is plain that Mr. Hamilton knew that Mr. Crotty was acting as an agent on commission for another party. On the same day Mr. Hamilton wrote to Mr. Crotty:—

I received your wire offer £4750 for Maxwell Buildings, which I forwarded to my London firm, advising them to take and wire acceptance. Ground rent is £50 per annum as stated, but other particulars you can verify.

On Monday, November 19th, the defendants sent to Mr. Hamilton the following telegram:—

Accept four thousand five hundred net, plus fifty pounds ground rent. Torrance.

On receipt of this wire Mr. Hamilton wrote to Mr. Crotty, as follows:—

Messrs. Miller, Son, & Torrance, Ltd., London, have wired me accepting your offer of £4750, four thousand seven hundred and fifty pounds, plus fifty pounds annual ground rent, for building at present tenanted by Messrs. Henry & Co., Maxwell Street. On the 20th November Mr. Hamilton wrote to Mr. Miller, stating he (i.e., Mr. Swan) told me to-day that his present stock is £45,000, so you need not fear the money.

He goes on to suggest rough agreement, £300 on deposit, the balance 1st May, 1918. On the 20th November the plaintiff sent on to defendants a formal proposal to purchase for £4750, subject to the yearly ground rent of £50, and providing for the payment of a deposit of £350, and the balance on 1st May. This was drafted by Mr. Crotty, and signed by the plaintiff. The

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object of the proposal is shown by Mr. Hamilton's next letter, 21st November, 1917. The plaintiff was anxious about clear title and possession on 1st November, 1918.

Up to this everything had gone on smoothly; the contracting parties were in perfect accord; both were quite satisfied. The vendors had got through Mr. Hamilton a much larger price than they anticipated; the purchaser was a man of large means, as known to Mr. Hamilton, and satisfied with his purchase. On the 21st Mr. Henry refused permission to the purchaser to see the factory. That same evening he started for London and saw the defendants. The result of the interview was most extraordinary. We have not heard the particulars of the interview or the nature of the charge made by Mr. Henry against Mr. Hamilton. Mr. Henry was stated to be in Court during the hearing, and was not called by defendants; the defendant Mr. Miller was not examined. Without asking for or waiting for any explanation from Mr. Hamilton, Mr. Miller, for the defendants, suddenly wrote that—

> As the details of the agreement are not in any sense satisfactory as to payment, and as to the present tenant, we definitely decline offer and consider proposal at an end. I may add that since receiving your letterMr. Henry himself has called, and as a result of our interview we have decided to accept his offer.

Whatever the legal aspect of this case may be, that is a deplorable letter, uncandid, inaccurate, and not such as one would expect from an honourable business man. Mr. Hamilton, who had done them a great service, is treated in a very unreasonable manner. On the 23rd November, 1917, Mr. Hamilton wired to defendants as follows:—

> You can't sell to Henry. Have submitted your acceptance to Swan as per your wire of 19th inst. accepting his offer.

On the same day 23rd November, 1917, Mr. Crotty's firm wrote to Mr. Hamilton that they held the acceptance of defendants of the offer of £4750, and requested the deeds to be forwarded to enable the necessary deeds to be prepared. The letter concludes as follows:—

> Our client [i.e. the plaintiff] is prepared to pay over the money as soon as you are in a position to complete.

On the same day, 23rd November, 1917, Mr. Hamilton wrote to the defendants as follows:—

> Your letter of 22nd comes to me as a great surprise. You have already accepted Mr. Crotty's offer by your wire received last Monday, and the details are only a question for your acceptance. If you want cash you can have it so soon as conveyance is ready. You had better consult your solicitor on the matter. Mr. Crotty made a definite offer; you confirmed by wire and letter, and details are a matter for your own convenience. Regarding Mr. Henry, I wrote you at first if the matter was left entirely in my own hands, I would give Mr. Henry the first refusal; if given to Graham and Carson I preferred it done through them, and I met Mr. Carson last week who had first seen Mr. Henry and given him the option. He had various offers from you and refused to buy it.

In a letter of 23rd November, 1917, the defendants wrote to Mr. Hamilton *inter alia*:—

> Mr. Henry has bought the property and paid down 10 per cent. deposit, and the remainder within a month, and the two points that I could justly take exception to in the offer were the terms of payment and the clause connected with the tenant. I need hardly say that under the circumstances I was glad of this excuse in the light of all Mr. Henry told me.

On 25th November Mr. Hamilton wired in reply to defendants:—

> Statement in your letter untrue; writing fully to-day.

On the 26th November, 1917, Mr. Hamilton wrote to defendants a most indignant letter containing full details of the transactions. On the 30th November, 1917, defendants' London solicitor wrote that the defendants declined to accept the terms of the proposal of 20th November, 1917.

I have now given the substance of the correspondence between the parties and their agents. I do not think it would be right to confine our attention to the two documents mentioned in the statement of claim. I think in all fairness the entire correspondence, which is in evidence, must be considered, and, if necessary, I should be prepared to allow any amendment to be inserted in the pleadings relying on the entire correspondence.

Two questions arise on this correspondence. First, was there a concluded contract between the parties before repudiation by the

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defendants? The subject-matter of the contract was fully understood by both parties, namely, the defendants' interest in a lease of the factory in Maxwell Street for 999 years, subject to a ground rent of £50, and subject to a sub-tenancy in Henry that is to expire on the 1st November, 1918. The plaintiff, through his agent Mr. Crotty, made a definite offer of £4750 to defendants' fully authorized agent Mr. Hamilton, and he accepted it on their behalf, and they confirmed his acceptance. There was nothing in the contract about a deposit, but the law imports into the contract two terms, that the defendants should be able to make a good title, and that the plaintiff should pay over the entire of the purchase-money as soon as the necessary deed was ready for execution. Almost every contract entered into by correspondence is intended to be followed by arrangement as to details, and in the end by a regular legal instrument. The memorandum of Mr. Crotty of the 20th November providing for a deposit and other details does not affect the original contract, and by refusing to accept it the defendants cannot get rid of the entire business. The parties were in accord from the very first; there was hardly anything in the nature of negotiation; the plaintiff was ready to buy and the defendants were willing to sell, and the transaction was fully understood by both parties. There can be no manner of doubt about the real intention of the parties.

The next question is whether the requirements of the Statute of Frauds have been complied with. This brings us to the object of the statute and to the terms of the 4th section. The object is to prevent frauds and perjuries by rendering mere parol evidence insufficient in the case of the sale of lands, tenements, or hereditaments, and it enacts that no action shall be brought whereby to charge any person upon such a contract unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

The section does not affect the contract itself, but the right of either party to sue the other, and it deals with the kind of proof required to maintain the action.

It is a well-settled rule that the writings relied on must be in

existence before the action is brought. It is also well settled that, for the purpose of ascertaining, first, whether there is a concluded contract, and, second, whether there is in letters sufficient evidence of such a contract to satisfy the Statute of Frauds, one must take into consideration the whole of the correspondence: *Hussey* v. *Horne-Payne* (1).

One is not to stop at a particular point where agreement seems to be reached. One must read the correspondence to the end, so as to ascertain whether the letters are evidence that the parties were really in accord throughout. It is said for the defendants that the transaction was not concluded; that something more was intended; that the plaintiff asked to see the premises before signing the agreement; that the words in the proposal are not applicable to the case of a concluded contract. But if in the correspondence we find evidence that all the essential and cardinal matters of the contract have been agreed to, that is all that is required. The agreement is complete, though it must be formally carried out. To use the language of Lord Hatherley in *Rossiter* v. *Miller* (2), "it has been established for far too long a time . . . that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, 'We will have this agreement put into due form by a solicitor.'"

It is said, on behalf of the defendants, that a contract to purchase the premises for £4750 and a ground rent of £50 is not a correct statement of the case. There is a rent of £35 reserved by the lease out of these premises and the Antrim premises, and the payment of £50 is to take effect by creating a sub-tenancy. The defendants cannot be allowed to set up such an objection even if

(1) 4 App. C. 311. (2) 3 App. C. 1143.

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it were material, because the plaintiff dealt with the matter as represented to him by defendants' own agent. It seems to me quite immaterial, because the gist of the matter is the purchase-money, £4750, and £50, ground rent payable to somebody. The next point relied on is that in the plaintiff's telegram of the 17th November, 1917, the ground rent is not mentioned; in the defendants' telegram of acceptance it is mentioned. Now, everybody knew that it was understood. It is, therefore, not a new term of the contract. The contention is that it is not assented to in writing.

Mr. Hamilton's letter of the 20th November to defendants shows that the plaintiff had called with him, and verbally assented to the terms of the telegram. The verbal assent is quite enough. This follows from the reasoning of Kindersley V.-C. in *Warner* v. *Willington* (1), now recognized as law. In the case of *Lever* v. *Koffler* (2) Byrne J. held that a verbal acceptance of one of two alternatives in a written and signed offer is sufficient to constitute an enforceable contract as against the writer. I am, therefore, of opinion that a definite contract was concluded between the parties; that the correspondence constitutes evidence sufficient to satisfy the Statute of Frauds; that the defendants' excuses put forward at the time are futile; and that the contention of his counsel at the trial cannot be supported.

I decree specific performance of the agreement, with costs against the defendants.

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1919. Jan. 13, 16. Feb. 3.

The defendants appealed to the Court of Appeal.

*Jellett K.C.* and *H. Wilson K.C.* (*M'Kean*, with them), for the appellants:—

We contend that there was no binding agreement for the sale of the premises, nor is there any note or memorandum in writing sufficient to satisfy the Statute of Frauds. The case made by the plaintiff was that the telegram of the 17th November, 1917,

(1) 3 Drew, 523. (2) [1901] 1 Ch. 543.

Crotty to Hamilton, constituted an offer, which was accepted by the letter of the 19th November, 1917, Hamilton to Crotty. That letter, however, contained a new term, not to be found in the telegram, namely, "plus £50 annual ground rent"; it was, therefore, not such an unconditional acceptance as is necessary to bind a contract: *Thomas* v. *Blackman* (1). There is no evidence that the plaintiff ever agreed to the term that "£50 annual ground rent" should be payable. The parties were never ad idem. The plaintiff thought he was purchasing a subsisting leasehold interest, subject to a rent of £50; the defendants contemplated selling a new sub-lease, subject to that rent. What contract is to be enforced? Not that pleaded in the statement of claim, because the defendants hold no leasehold premises subject to the rent of £50. If it could otherwise be held, on the authority of *Hughes* v. *Parker* (2), that there was a contract to sell the fee, the defendants cannot sell the fee; they have only a leasehold interest. It cannot be said that there was a concluded contract to sell for a long term carved out of the subsisting lease, at a yearly rent of £50, as neither the duration of the term nor the date of its commencement was ever discussed, much less agreed upon: *Warner* v. *Willington* (3).

*Serjeant Matheson* and *S. L. Brown K.C.* (*H. Thompson*, with them), for the respondent:—

Taking the correspondence as a whole, as we must (*Hussey* v. *Horne-Payne* (4), there is sufficient evidence of a concluded agreement, and it cannot be said the parties were not ad idem. That a £50 ground rent was to be payable was a common factor in the minds of both parties, and their intention is clear: *Rossiter* v. *Miller* (5). It was immaterial to the purchaser to whom the £50 rent was payable. If there was confusion as to the title, it was brought about by Hamilton, the authorized agent of the vendors, and cannot now be relied upon by the latter. In any case we are willing to take, without compensation, the interest the vendors can sell to us. The letter of 20th November, 1917, from the

(1) 1 Coll. 301.
(2) 8 M. & W. 244.
(3) 3 Drew, 523.
(4) 4 App. Cas. 311.
(5) 3 App. Cas. 1124.

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purchaser to the vendors, is not a new proposal; it merely points to the execution of a formal agreement, but cannot affect the legal obligations of the parties already incurred: *Rossiter* v. *Miller* (1). Alternatively we contend that if the letter of the 19th November, from Hamilton to Crotty, is not an acceptance of a prior offer, by reason of the inclusion of the term as to £50 ground rent, it in itself constitutes an offer; and if there is evidence of a verbal acceptance of that offer prior to the repudiation of the 22nd November, the letter of the 19th November is a sufficient memorandum to satisfy the Statute of Frauds; *Lever* v. *Koffler* (2); *Hussey* v. *Horne-Payne* (3). The letter of the 20th November from Hamilton to the vendors is evidence of such verbal acceptance. Hamilton was the agent authorized by the vendors to sell, and an acceptance to him was sufficient: the letter proves such acceptance.

RONAN L.J.:—That is a letter from an agent to his own principals. Is it evidence against them of the facts therein stated?

*Brown K.C.*—Yes; he was their agent to accept the offer; this is an admission of the fact of acceptance.

RONAN L.J.—The statement is merely a narrative of a past event. Have you considered *Langhorn* v. *Allnutt*? (4).

*Brown K.C.*—The agent was bound to communicate the acceptance, and he did so. *The Solway* (5) shows that the letter from the agent to his principal is admissible as evidence against them of the facts stated. The acceptance and the communication of the acceptance are part of the res gestae. As to the tenure and the commencement of the term, we say that this was really a sale of the vendors' interest, subject to £50 rent; the tenure was sufficiently known, and in the minds of both parties to the contract, and the term would run from the day when possession was given: *In re Lander and Bagley's Contract* (6); *Cowley* v. *Watts* (7).

(1) 3 App. Cas. 1124.
(2) [1901] 1 Ch. 543.
(3) 4 A.C. 311.
(4) 4 Taunt. 511.
(5) 10 P. D. 137.
(6) [1892] 3 Ch. 41.
(7) 22 L. J. Ch. 591.

*Jellett K.C.*, in reply :—

The case which was pleaded, and made throughout the trial, was that Hamilton's letter of the 19th November to Crotty accepting the offer contained in Crotty's telegram constituted the contract. If, however, this letter from Hamilton to Crotty is to be treated as a fresh offer, there is no evidence of any acceptance of that offer prior to the defendants' repudiation of the 22nd November. The letter of the 20th November from Hamilton to his own principals is not admissible as evidence against the principals. Even if admissible in evidence, it does not prove the facts stated in the letters: *Langhorn* v. *Allnutt* (1). The letter does not in any event bear the construction sought to be put upon it.

[He also cited *Marshall* v. *Berridge* (2), *Bayley* v. *Fitzmaurice* (3), *Gordon* v. *Trevelyan* (4).]

*Cur. adv. vult.*

SIR JAMES CAMPBELL C. :—

The plaintiff in this action is a clothing manufacturer carrying on business in Belfast, and the defendants are a limited company trading as manufacturers and warehousemen in the city of London. They appear to have had a branch establishment in Belfast, referred to in the evidence as Antrim's, for the sale of boys' ready-made clothing, but this branch had been closed for some six years prior to the date of the present proceedings. The defendants offered no evidence, oral or documentary, at the trial, so that the precise nature of their title to these premises is left in some obscurity. It was assumed at the trial and on the hearing of this appeal, and indeed so much may be collected from the evidence and correspondence relied upon by the plaintiff, that these premises, together with other premises situate in Maxwell Street, Belfast, were held by the defendants under a lease for 999 years, but no formal proof was given either as to the date of the commencement of this lease, or as to the amount of the rent to which it was subject. At some date not fixed, but antecedent to the negotiations in the present case, the defendants had assigned to a purchaser their interest in the Antrim premises by way of

(1) 4 Taunt. 511.
(2) 19 Ch. D. 233.
(3) 8 E. & B. 664.
(4) 1 Price, 64.

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sub-lease subject to a rent of £60, and on the 2nd November, 1917, they wrote to a gentleman named Hamilton, who had formerly been their partner in the Antrim concern, but was then engaged in business in Belfast on his own account, asking him to procure for them a purchaser of their interest in the Maxwell Street premises at the price of £3000. Mr. Hamilton replied to the effect that this price was too low, and suggested that if they left it in his hands he would offer the premises for £5000, and recommended them to effect the sale by an under-lease, as in the case of the Antrim premises, subject to a rent of £50. By this letter of 5th November, 1917, he assumes that the rent for the entire premises for which the defendants were liable was £35, and points out that the suggested rent of £50 plus the £60 rent of the under-lease of Antrim's would give a total of £110, leaving the defendants in the enjoyment of a surplus rent of £75, which he estimated would fetch twenty years' purchase or £1500 in the market. After some negotiations, Hamilton was in a position to inform the defendants that he had a purchaser prepared to offer £4725 plus £50 ground rent for their interest in these Maxwell Street premises, but as the purchaser's agent would require a commission fee of 2½ per cent. on the price, this would leave the price for the defendants £4500 net, plus the £50 rent. The defendants thereupon expressly authorized Hamilton by letter of 15th November to offer the premises on these terms, and this fact being communicated to Mr. Crotty, who was acting for the intending purchaser the plaintiff, he in turn brought it to the knowledge of the plaintiff, and by his instructions, on November 17 wired Mr. Hamilton as follows:—"Offer you £4750 for Maxwell Buildings." To this telegram Mr. Hamilton replied by letter as follows:—"Dear Mr. Crotty, I received your wire, 'Offer you £4750 for Maxwell Buildings,' which I forwarded to my London Firm, advising them to take and wire acceptance. Ground rent is £50 per annum, as stated, but other particulars you can verify.

"Yours sincerely,

J. W. A. HAMILTON."

Mr. Hamilton that same afternoon wired to the defendants: "Offer received; £4500 net; writing," and wrote to them to the same effect the same evening, pointing out that this offer meant

£250 commission for Crotty and £4500 for them. On November 19th the defendants wired Hamilton: "Accept £4500 net plus £50 ground rent," and wrote him on same day a letter confirming their telegram. Upon receipt of this telegram Mr. Hamilton wrote to Crotty, informing him that the defendants had accepted his offer of £4750 plus annual ground rent of £50 for building then tenanted by Messrs. Henry & Co., Maxwell Street. It appears that Messrs. Henry were tenants of these buildings to the defendants under a letting which would expire on 1st November, 1918. Upon November 20th Hamilton wrote to the defendants an important letter, in which he says that the plaintiff had called on him that day to say he had bought Henry's factory at £4750 plus £50 ground rent, and he goes on to add that the bargain is now closed. The defendants, on November 22nd, wrote to Mr. Hamilton repudiating the bargain, and stating they had that day closed with an offer from their tenants Messrs. Henry. It is no wonder that this letter aroused the indignation of Mr. Hamilton, or that in his reply he expressed his opinion of their conduct in forcible language, seeing that his negotiations had gained for them an immediate increase of £1500 over the £3000 as fixed by themselves, and a prospective increase of another £1500 by the sale of the ground rent; and I confess I share in the view of Ross J., who in agreement with Mr. Hamilton regarded their repudiation in an unfavourable light. It was assumed in the course of the argument that Messrs. Henry had made an advance on plaintiff's offer, and such an inference is certainly suggested from the defendants' reference to "this excuse" in their letter to Hamilton of 23rd November, and from their failure to offer any evidence at the trial as to the real motive for their awakened interest in their occupying tenant, or as to the slightest failure on the part of their authorized agent to carry out their definite instructions in the matter. In this state of facts the defendants contend—first, that there was no concluded agreement, that they and the plaintiff were never ad idem, as they were selling a non-existing under-lease subject to a rent of £50, and the plaintiff was buying an existing lease at that rent; and second, that there was no memorandum in writing signed by them or their authorized agent sufficient to satisfy the Statute of Frauds.

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In my opinion their first contention wholly fails, as the idea of an under-lease was known only to themselves and Hamilton, and was apparently never communicated either to Crotty or the plaintiff, or made in any sense a term of the contract. Hamilton, as Ross J. states in his report, was admitted to have been authorized by the defendants as their agent to sell this property; and on the evidence I think it is clear that his agreement with Crotty was for the sale of these premises under an existing lease for a term of 999 years, subject to a rent of £50. Their second contention as to the absence of a sufficient memorandum in writing is a more serious matter. They put it in this way. Plaintiff's telegram of the 17th November was, they argue, on the authority of *Hughes* v. *Parker* (1), an offer to purchase the fee simple at the price of £4750, while Hamilton's acceptance was of something different by reason of the addition of a new term, the £50 rent. Counsel for the plaintiff have argued that this is immaterial, inasmuch as the documents establish that the liability of the purchaser for this rent was common knowledge, the subject-matter of the bargain being, on the statements of both parties to it, premises held under a lease for 999 years, subject to a rent of £50. Being satisfied as I am that this contention is true in fact, I regret that I am unable to give effect to it by reason of the requirements of the Statute of Frauds, as in my opinion if the Court is coerced to treat the lease as the subject-matter for sale, the omission of any date for the commencement of this lease is a fatal objection.

The case for the plaintiff has, however, been presented in argument before us in an alternative way. His counsel admit that the defendants are right in contending, on the authority of *Hughes* v. *Parker* (1), that plaintiffs' telegram of the 17th November was in law an offer for the fee simple; but they say that on the same principle defendants' telegram of acceptance, followed by Hamilton's letter to Crotty of the same date communicating this acceptance, though vitiated as an acceptance by the introduction of a new term, was in law an offer to sell the premises in fee simple for £4750, plus a perpetual charge or rent of £50, or, at the lowest, was an offer to sell all their interest in the property on the terms indicated: see *Boxer* v. *Cooper* (2); that

(1) 8 M. & W. 244. (2) 2 Hare, 408.

this offer became a binding contract once it was accepted, even verbally, by the plaintiff, and constitutes a sufficient memorandum in writing, signed by the party to be charged, entitling the plaintiff to specific performance on the part of the defendants by their conveying to him the interest which they in fact possess in the premises.

It is well settled that in contracts for the sale of lands where the vendor's estate turns out to be of a lower degree than that agreed to be sold, a willing purchaser is entitled to a decree for specific performance with compensation; and, though counsel for the defendants suggested that this doctrine is confined to cases where compensation is claimed, I think it certain that it has an a fortiori application where a willing purchaser is prepared to accept the actual estate of his vendor, and waives his claim to compensation.

It was assumed by counsel on both sides that a vendor who, in purporting to accept the purchaser's offer, introduces a new term into the proposed contract is, in law and in fact, making a counter-offer, which the purchaser by accepting may convert into a contract; and this is stated to be the law in Halsbury's Laws of England, vol. vii, p. 350, paragraph 720. See *Lucas* v. *James* (1) and *Honeyman* v. *Marryat* (2). In *Canning* v. *Farquhar* (3) Lindley L.J. says that where a proposal for insurance does not state the premium to be paid, but is accepted by the company who state the premium, it amounts to a counter-offer by them, binding as a contract when the premium is paid. If, therefore, this telegram of the 19th November, from defendants to Hamilton, and his letter of same date to Crotty, constituted, as I am of opinion they did, a counter-offer, it remains to consider whether it was accepted by the plaintiff. I should myself have thought that the conduct of the parties, plaintiff and defendants, as evidenced by their acts and correspondence from the 19th to the 23rd, inclusive, was abundantly sufficient to justify the inference that plaintiff, to the knowledge of the defendants, had accepted their counter-offer of the 19th November. Plaintiff begins his letter to them of the 20th November with the words, "I propose to purchase," &c., and, read in the light of the previous corre-

(1) 7 Hare, 410. (2) 21 Beav. 14. (3) 16 Q. B. D. 727, C. A.

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spondence, I think this letter should fairly be construed as suggesting the details for completion of a previous contract, while the defendants themselves by their letters to Hamilton of 22nd and 23rd November treat it as containing "*the details of the agreement*," and utilize it for what they aptly describe as an excuse for repudiation. Counsel for the defendants, however, have ignored these letters, and concentrated their attack upon the letter of Hamilton to the defendants of the 20th November, in which he writes that plaintiff had called in to him that day to say that he had bought Henry's factory at £4750, plus £50 ground rent; and, later on in the same letter, he refers to the bargain as "now closed." The contention is two-fold: first, that this letter was not admissible as evidence, and, second, that upon its true construction it is no proof of a communicated acceptance.

Even if this first contention was correct, I am clearly of opinion that the defendants are precluded from raising it. In their affidavit of documents they discovered the entire correspondence between Hamilton and themselves, including this letter, and though this fact alone would not make it evidence, it is material to notice that no privilege is claimed in respect of any portion of it. Next, it is plain from the report of Ross J. that counsel for the plaintiff, in opening his case at the trial, read the entire of this correspondence, and put it in evidence, without the slightest objection on the part of counsel for the defendants. Not only did they offer no objection to its admissibility, but they themselves relied upon it in their cross-examination of plaintiff's witnesses for the purpose of establishing their defence, giving no independent evidence of their own (see particularly questions 39 and 75); and even on the hearing of this appeal the question as to its admissibility was not, in the first instance, raised by them, but was suggested by my brother O'Connor L.J. Had the objection, in fact, been taken at the trial, the fact of acceptance could have been proved at once by a single question to either the plaintiff or to Hamilton, and the omission to question either of these witnesses as to this and other facts of the case, is entirely accounted for by the course of the trial, both sides plainly regarding and treating this correspondence as part of the admitted evidence in the case. To give effect to this

objection now in such circumstances would, in my view, be contrary to the settled practice of our courts. Even the improper admission of evidence, though formally objected to at the time, will not entitle the defeated party to a new trial unless the court is of opinion that some substantial wrong or miscarriage has been thereby occasioned to him, and to yield to it at this stage in a case in which the defendants not only raised no objection to the reception of the correspondence, but relied upon and used it for themselves, would amount to a denial of justice to the plaintiff. Further, I am of opinion that the admission of this letter as evidence for the plaintiff was not open to valid objection. It was suggested that letters written by an agent to his principal cannot be used as evidence against the latter, and the case of *Langhorn* v. *Allnutt* (1) was relied upon for this proposition; but the decision in that case was confined to letters purporting to contain the agent's account or report of transactions already past, and the true principle is, in my opinion, to be found in the following statement from Taylor on the Law of Evidence, 10th edition, p. 425:—"If a letter written by an agent form the whole or part of an agreement which by the course of his business he was authorized to make, it will be admissible against the principal, but if it be offered as proof of the contents of a pre-existing contract, or if it contains an account of transactions already performed, it will probably be rejected, though addressed to the principal himself." So long as it is part of the res gestae in the sense of these words pointed out in Phipson on Evidence, 5th ed., p. 232, that is to say, written in reference to the business on hand, or, to put it in another way, "dum fervet opus," it can be used against the principal: see *The Solway* (2). In that case the action was for breach of contract in the non-delivery of certain goods shipped in "The Solway," which was wrecked on the voyage. Plaintiff tendered in evidence a letter from the master of the ship to his owners, in which he stated certain facts as to the loss of the ship; and objection being taken to its reception, Sir James Hannen ruled it to be evidence as being written by the master in the course of his duty to the owners; and though the decision in that case is open to question upon its special facts, I think the principle

(1) 4 Taunt. 511.

(2) 10 P. D. 137.

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which the learned Judge was seeking to apply is identical with that referred to in Taylor. The letter in question in this case was written by Hamilton to his principals the day after the receipt by him of their telegram authorizing him to make the counter-offer to the plaintiff, and in informing them that the plaintiff had called on him, and in effect intimated to him his acceptance of this offer, he was discharging the precise duty entrusted by them to him in direct reference to the agreement he was authorized to make; and it was therefore, in my opinion, both on principle and authority, admissible in evidence against them as proof of the communication to their authorized agent of the acceptance by the plaintiff of his offer.

It has been urged, in the next place, that this is not upon its true construction the effect of the letter, but in my view the letter amounts to a statement by him to the defendants that the plaintiff had called on him and informed him that he had accepted their offer, and that it was expressly written for this very purpose. The plaintiff could not have called to tell him that his original offer had been accepted by the defendants, as it was by Hamilton himself that he had already been made aware of this; and the object of his visit must have been to let Hamilton know that he had accepted the offer with its new term of £50 ground rent.

Finally, it has been contended that this view of the case differs from that presented on behalf of the plaintiff by his pleading and at the trial. It was, I think, plainly indicated by Ross J., who in his judgment says:—"I have now given the substance of the correspondence between the parties and their agents. I do not think it would be right to confine our attention to the two documents mentioned in the statement of claim. I think in all fairness the entire correspondence which is in evidence must be considered, *and, if necessary, I should be prepared to allow any amendment to be inserted in the pleadings, relying on the entire correspondence.*" It formed the basis of the argument of counsel for the plaintiff upon this appeal, and came as no surprise to the defendants, depending entirely, as it does, upon the effect of the evidence, oral and documentary, given at the trial of the action.

In the result, I arrive at the same conclusion as Ross J., but not, perhaps, by precisely the same process of reasoning. In my

opinion, the telegram of the defendants of November 19th, as communicated by Hamilton, their authorized agent, by letter of same date, to the agents of the plaintiff, was in law an offer to sell their interest in the premises at the stipulated price, and contained the essentials of a sufficient memorandum in writing : the parties, the premises, and the price. I am also satisfied that the offer was accepted by the plaintiff, and his acceptance brought to the knowledge of the defendants and their agent prior to their attempted repudiation, and that the plaintiff, as a willing purchaser of the estate or interest of the defendants in the premises, is entitled to a decree in his favour, with the consequent dismissal of this appeal.

RONAN L.J. :—

I regret that I am unable to concur with the judgment of the Lord Chancellor, but I consider that I am precluded by law from doing so. I shall state my views shortly, as I have had the advantage of reading the judgment of O'Connor L.J., which gives the history of this transaction fully.

There is no ambiguity in the decree appealed against. It is as follows :—"This Court doth declare that the telegram dated the 17th day of November, 1917, sent by F. R. Crotty to John W. A. Hamilton, the telegram dated the 19th day of November, 1917, from the defendants to the said John W. A. Hamilton, the letter dated the 19th day of November, 1917, from John W. A. Hamilton to F. R. Crotty, and the letter dated the 19th day of November, 1917, from F. W. Miller to John W. A. Hamilton, constituted a binding agreement between the plaintiff and the defendants, and that the said agreement ought to be specifically performed and carried into execution, and doth order and adjudge the same accordingly." These documents were held accordingly to constitute a binding contract, and that contract was supposed to have been complete at the date of the last-mentioned letter from Hamilton to Crotty, which was in the following terms :—"Messrs. Miller, Son, and Torrance, Ltd., London, have wired me accepting your offer of £4750, plus £50 annual ground rent, for building at present tenanted by Messrs. Henry & Co., Maxwell St."

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There is no hint or suggestion in the decree of any agreement subsequent to that date, the 19th November, 1917; or that the letter of the 19th November, 1917, was an offer, followed by a subsequent acceptance, constituting a binding agreement. No such case was made in the Court below, nor indeed do I think any such case was suggested before us until a late stage in the argument. The position taken up in the Court below was that that there had been an acceptance of the first offer. This, in my opinion, explains the omission to give proper evidence of the verbal acceptance of the offer of the 19th, if there was such an acceptance in fact.

I now come to the point which I think has led to the chief difference of opinion between the members of this Court, namely, the effect which is to be given to the letter of the 20th November, 1917, from Hamilton to Miller. Assuming that there was a fresh offer on the 19th November, containing a new term as to the £50 ground rent, is there any legal evidence of an acceptance of that offer between the 19th and the 22nd November, when the defendants repudiated the entire transaction? The Lord Chancellor has suggested that the letter of the 20th November from Swan to the defendants—a letter which was not relied upon as proof of an acceptance, and which is subsequent to all the documents specified in the declaration in the decree—could be taken as an acceptance of the offer of the 19th. What is this letter? "I propose to purchase from you the premises known as No. 10 Maxwell St.," &c.; and then follow the terms of the proposal. I am unable to see how this letter can possibly be regarded as an acceptance of a former proposal. The letter of the 22nd November from the defendants to Hamilton refers to this letter of the 20th, and states, "As the details of the agreement are not in any sense satisfactory as to payment . . . we definitely decline offer," &c. What are these details? They are obviously the details of the proposal contained in the letter of the 20th, a formal proposal. In other words, there was an offer on certain terms made by the letter of the 20th, and that offer was declined by the letter of the 22nd.

I come now to the question of the agent's letter. What has to be proved by the plaintiff in this case is the actual acceptance

of an offer communicated to the defendants prior to the date of the repudiation of the 22nd. We are, I think, now agreed that there was no binding agreement constituted by the documents mentioned in the declaration in the decree. What is the effect of the letter of the 20th November, written by the agent, Hamilton, to his principal, Miller? "Mr. Swan . . . called with me to-day to say he had bought Henry's factory at £4750, plus £50 ground rent, and thanking me for the information I had given him, and asking me to arrange with Mr. Henry to see through the factory before he signed the agreement," &c. Is that anything more than a narrative of something that had occurred in the past? ". . . to say he had bought . . ." He thought that the original telegram and the reply formed a contract. That is the obvious meaning of it. It is not that he came to tell him that there was no contract up to then, but that he had received a fresh offer, which he had accepted. That is not the true construction of the letter. It is simply a narrative of what had taken place, and no more. But even if the letter went further, if it amounted to this, that Swan had called on him that day, and said that he had accepted the offer contained in the letter of the 19th November, in my opinion that would be no proof of the fact of such acceptance.

When a question turning on a rule of evidence such as this has to be considered, it is, as was once pointed out by Sir George Jessel, useful to refer to the statements of writers of text-books, as expressing the views held on the subject by the profession generally. The matter is thus dealt with in Lord Halsbury's Laws of England, vol. i, p. 215, under the heading, not of Evidence, but of Agency:—"Where, however, the agent makes any admission without, or in excess of, his authority, the principal is not bound by it, unless the agent, at the time when he made it, was acting on his principal's behalf in the transaction to which the admission referred, and made it in the ordinary course of his duty as such agent. In no case does any admission of the agent operate to bind his principal, except as regards the transaction in respect of which it was made, nor can any statement made by an agent to his principal be used as an admission against the principal by third persons." And the note is added: "Otherwise, if the statement is made to the principal by the agent in the course of his

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duty: *The Solway* (1)." It is curious that in this case of *The Solway* (1), which has been so strongly relied upon by the Lord Chancellor, none of the authorities bearing on the subject to which we have been referred was cited. The only cases mentioned were *Nothard* v. *Pepper* (2); *The Little Lizzie* (3); and *The Manchester* (4). In the last case Mr. Reid K.C. contended that "admissions made by an agent to his employer in the course of his duty have always been received as evidence," and in the result Sir James Hannen held that the evidence there in dispute, consisting of a letter from the master of a ship to her owners, was admissible. I am unable to take this case as overruling the well-established authorities to the contrary which were not even referred to there. In Roscoe's work on Evidence at Nisi Prius the law is stated thus, page 69:—"With regard to the admissions of agents in general, the rule is this: When it is proved that *A* is agent of *B*, whatever *A* does, or says, or writes, in the making of a contract as agent of *B*, is admissible in evidence against *B*, because it is part of the contract which he makes for *B*, and which therefore binds *B*; but it is not admissible merely as the agent's account of what has passed. Per Gibbs J., *Langhorn* v. *Allnutt* (5)." In a later paragraph he states: "A letter from the master of a ship to her owners has been held admissible against them, with regard to the facts, but not to the opinions therein stated: *The Solway* (1)"—a statement which is clearly inconsistent with the former; but the author does not attempt to reconcile the two. Mr. Bowstead in his work on Agency, pages 361-2, enumerates the cases where an admission or representation made by an agent may be admissible in evidence against the principal, and adds: "Provided always, that a report made by an agent to his principal cannot be put in evidence against the principal by any third person"—for which proposition he cites as authorities *Reyner* v. *Pearson* (6) and *Kahl* v. *Jansen* (7); but he adds: "see, however, *The Solway* (1)," suggesting thereby that the latter case may throw some doubt on his proposition. In Phipson on Evidence, 5th ed., p. 233, the law is stated as follows:—"An agent's reports to his principal are not evidence either for,

(1) [1885] 10 P. D. 137.
(2) 17 C. B. (N. S.) 39.
(3) 3 A. & E. 56.
(4) 1 Wm. Rob. 62.
(5) 4 Taunt. 519.
(6) 4 Taunt. 662.
(7) 4 Taunt. 565.

*Turner* v. *Hutchinson* (1); *Splents* v. *Lefevre* (2); or against, *Re Devala Company* (3), and cases infra the latter. *The Solway* (4), post, 238, contra, seems not sustainable. If, however, the principal has replied to the agent, the letters of the latter will be admissible as explanatory of the statements of the former: *Coates* v. *Bainbridge* (5)."

I shall now refer to authorities which, I think, establish clearly that the letter of the 20th November, written by the agent to his principal, affords no evidence of the facts therein stated. The first of these, *Fairlie* v. *Hastings* (6), is, I think, the most important of all, having regard to the pre-eminent authority of the judge who decided it. At page 126 of the report the Master of the Rolls, Sir William Grant, said:—"An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal, or the representation or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But except in one or the other of those ways I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. For instance, if it was a material fact that there was the bond of the defendant in the hands of Caunto Baboo, that fact would not be proved by the assertion that Gobindee Baboo, supposing him an agent, had said there was; for that is no fact, that is, no part of any agreement which Gobindee Baboo is making, or of any statement he is making, as inducement to an agreement. It is mere narration; communication to the witness in the course of conversation: and therefore could not be evidence of the existence of the fact. The admission

(1) 3 L. T. 815.
(2) 19 L. T. 114, 117.
(3) 22 Ch. D. 593.
(4) 10 P. D. 137.
(5) 5 Bing. 58.
(6) 10 Ves. 123.

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of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord Kenyon carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal, holding that the agent himself must be examined: *Maesters* v. *Abram* (1)." In *Langhorn* v. *Allnutt* (2) Sir James Mansfield C.J. referred to *Fairlie* v. *Hastings* (3). He says (p. 517):—"It is unnecessary to go into all the cases where letters of an agent have been received or rejected. The Master of the Rolls, in the case of *Fairlie* v. *Hastings* (3), has gone into some of them; but it suffices to say these letters are not a part of the res gestae, not letters written in the course of the transaction and forming a part of it, but a mere narrative." Chambre J. said (p. 518):—"As to the letters, I think it quite clear that they were properly rejected; they are not part of the res gestae, but merely an account of them, and upon no ground admissible." And Gibbs J. added:—"Now, what are these letters? They are not part of the contract itself or of the res gestae, but they are the account which the agent renders to his principal of what he is doing; they are not, therefore, admissible." I may point out that in two subsequent cases in this same volume of Taunton (*Reyner* v. *Pearson* (4); *Kahl* v. *Jansen* (5)), the decision in *Langhorn* v. *Allnutt* (2) was adopted and followed by the Court.

Finally, my learned colleague, O'Connor L.J., will refer in his judgment to a Scotch decision in which *The Solway* (6) was dissented from, if not expressly overruled.

I am clearly of opinion that this letter from the agent to his principal affords no evidence of the facts therein stated, and that the cases I have cited are specific authorities to this effect. I accordingly hold with regret that the decree of Ross J. cannot be upheld, and that this appeal must be allowed.

(1) 1 Esp. N. P. Cas. 375.
(2) 4 Taunt. 511.
(3) 10 Ves. 123.
(4) 4 Taunt. 662.
(5) 4 Taunt. 565.
(6) 10 P. D. 137.

O'CONNOR L.J.:—

The plaintiff in this action declares upon an agreement by the defendants to sell to him for £4750 certain premises in Maxwell Street, Belfast, held for a long term of years, subject to the yearly rent of £50, and in the occupation of Messrs. Henry & Co., under a sub-tenancy terminating on the 1st November, 1918. The agreement, according to the statement of claim, is to be found in an offer by the plaintiff (through his agent) contained in a telegram of 17th November, 1917, and in an acceptance by letter of the defendants' agent, dated 19th November, 1917.

The facts are not in dispute. The defendants, a London firm, have property situate in Maxwell Street, Belfast, held for 999 years, at the yearly rent of £35. Portion of this property is let to people called Antrim, at a rent of £60 a year; the other portion is or was in the occupation of Messrs. Henry & Co., whose lease expired in November, 1918.

This action has to deal solely with the portion in Messrs. Henry's occupation. In November, 1917, the defendants authorized a Mr. Hamilton to negotiate a sale of the Henry premises on their behalf. Apparently at Hamilton's suggestion, the defendants resolved to carve out a sub-lease of this portion of their leasehold, to fix a rent of £50 on the sub-lease, and to sell subject to such rent. Hamilton put himself in communication with a Mr. Crotty, an estate agent, who, as the event proved, was acting for the plaintiff. The result of an interview between Hamilton and Crotty was, apparently, to leave Crotty under the impression that what the defendants had to sell was a plot of land held by them for a long term at a rent of £50; it was an actually subsisting leasehold interest Crotty thought he was negotiating for; it is an actually subsisting leasehold interest the plaintiff by his pleading avers he has bought. But in truth and in fact the defendants had no such term to sell; what they had to sell was a term for a long period of years, which they proposed to create subject to a rent of £50; the duration of the derivative term and its commencement were not arranged or resolved upon by them, much less communicated to the plaintiff.

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Such being the knowledge and intention of the parties, Mr. Crotty sent a telegram to Hamilton on the 17th November, 1917, in the following terms:—"Offer you £4750 for Maxwell Buildings. Crotty." Mr. Hamilton replied on the same day: "Dear Mr. Crotty, I received your wire, 'Offer you £4750 for Maxwell Buildings,' which I forwarded to my London firm, advising them to take, and wire acceptance. Ground rent is £50, as stated, but other particulars you can verify. Yours sincerely, J. W. H. Hamilton." Hamilton communicated the offer by letter on the same day to the defendants, who wired him on the 19th: "Accept four thousand five hundred net, plus fifty pounds ground rent" (this £4500 being the net sum after providing for Hamilton's commission). On receipt of this wire, Hamilton writes to Crotty on the 19th November, 1917, as follows:—"Dear Mr. Crotty, Messrs. Miller, Son & Torrance, Ltd., London, have wired me accepting your offer of (£4750) four thousand seven hundred and fifty pounds, plus £50 annual ground rent, for building at present tenanted by Messrs. Henry & Co., Maxwell Street. Yours sincerely, J. W. A. Hamilton." Later, namely on the 22nd, the defendants repudiated the proposal.

That is the whole story, so far as written offer and acceptance are concerned. Is any enforceable contract made out from them? I think not. In the first place, on the face of the documents themselves there is no unconditional acceptance. The offer was £4750 simpliciter; the alleged acceptance was £4750 plus £50 annual ground rent. That is a vital difference. But then, it is said, by going behind the documents and looking at what passed verbally between the parties, we can find that they always understood that there was to be a rent of £50; and by thus forging out of verbal communications certain missing links, a chain can be produced that will stand the strain of the Statute of Frauds.

With great respect for the judgment of Mr. Justice Ross, I cannot think the well-known principle whereby resort may sometimes be had to verbal communications to explain or supplement the written documents can help in this case. It is true that where a written contract for the sale of property refers to and identifies a certain thing, recourse can be had to verbal testimony to see what that thing is. A familiar example is where the writing

refers to "my interest" in named premises, or some such phrase; it is permissible to find out aliunde what "my interest" is; id certum est quod certum reddi potest. But in this case, on reference to the evidence, we find that the parties were not ad idem at all. There was nothing certain between them, and therefore nothing could be made certain by referring to what passed verbally between them. If the real intention of the parties was to sell an existing leasehold interest, it may be—I do not so lay it down—that we could look at the lease to see what the leasehold was. Mr. Crotty of course thought he was buying an existing leasehold; but he was wrong, for the defendants only meant to sell and offered to sell a derivative term, the commencement as well as the duration of which remained to be fixed. For this reason, I think the attempt to supplement the documents in the method suggested fails.

Alternatively, however, the plaintiff relies on a point not pleaded by him; and we are told, not argued or even thought of at the trial. It is this. The plaintiff says that Mr. Hamilton's letter of the 19th November, 1917, constituted a fresh offer; that it was verbally accepted by Mr. Swan himself, as appears by Mr. Hamilton's letter to Mr. Miller of the 20th November; and that, a verbal acceptance being sufficient, the contract was concluded by the verbal acceptance.

For the reasons which I have already stated, the letter of the 19th November—omitting any reference to the commencement or duration of the term proposed to be carved out—is not in my opinion a good memorandum to satisfy the Statute of Frauds. But then, we are invited to look at the document as embodying an offer to sell the fee subject to a rent of £50, and the plaintiff says he is willing to take a long term without compensation, in lieu of the fee. True, where an offer is made simply to sell without more, that prima facie means the fee. But the presumption that it means the fee entirely disappears where the facts show that it was not meant to sell the fee. Further, this point fails also for want of proof. The verbal acceptance relied on was from Swan to Hamilton. Neither of these witnesses was asked a word about it.

It is argued that the letter from Hamilton to Miller of the 20th November is proof of the verbal acceptance relied on. In

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the first place, in my opinion, it does not, fairly construed, bear the interpretation sought to be put upon it. I think the letter refers not to a purported or intended acceptance by Swan, but to a mere statement by Swan that he was the principal for whom Crotty was acting in the purchase, which Swan looked upon as already concluded by the correspondence.

In the second place, I do not think that the letter is admissible as evidence of the fact to be proved. The fact to be proved is the verbal acceptance alleged to have taken place in an interview between Swan and Hamilton. The letter is a narrative of what took place at that interview. The interview could have been proved by calling and examining, on oath at the trial, Swan or Hamilton or anyone else who was present at it. What a person present at an interview says to somebody else, on another occasion, as to what took place at the interview is hearsay and, prima facie, at any rate, not evidence thereof.

It is, however, argued that the letter should be treated as a written statement made in such circumstances as to bind the principal. That is, of course, another way of saying that the letter should be treated as the letter of the principal, and therefore a statement or admission by the principal of the facts stated in it. It will be observed that the point is whether it is an admission binding the principal. The point is not whether it is admissible in evidence against the principal. I shall discuss these points in order.

I am of opinion that this letter is not an admission binding the principal. The question whether a statement of an agent is to be treated as the statement of (and therefore binding) the principal is to be determined by the ordinary rule by which the responsibility of a principal for the acts of his agent is determined. That rule is, that the principal is responsible for the acts of his agent done within the scope of his authority. When a man employs another to carry out a transaction on his behalf, he is responsible for what the other necessarily does in the carrying out of the transaction. Let me apply that principle to the negotiation and completion of a contract of sale. A principal party gives an agent full authority to negotiate and complete

such a contract. This involves the necessity of the agent making offers, representations, and statements as to the property to intending purchasers. Such statements are as binding on the principal as if made by the principal himself, because they are obviously within the scope of the agent's authority to bind the principal thereby. But it is, in my opinion, equally obvious that many statements may be made by the agent with regard to the property or transaction which are not binding on the principal, as not being within the scope of the agent's authority to bind the principal. To test whether the statement binds the principal one has to consider the nature of the statement and the circumstances in which it is made, including, for example, the person to whom, and the time at which, the statement is made. Now, I am of opinion that having regard to the person to whom and the time at which the statement in this letter was made, it is not a statement binding the principal.

First, as to the person to whom this statement was made. The letter is written by the agent to the principal. Does that bind the principal? It can only bind the principal on the ground that it is within the scope of an agent's authority to bind his principal in the principal's legal relations with third parties by a statement made by the agent to the principal himself. I am unaware of any legal principle upon which this contention can be founded. The notion that a principal should be bound by what his agent says to him seems to me to have no warrant whatever, either in law or sense. If it were otherwise, a principal might find himself saddled with obligations never in his contemplation by an inaccurate agent's report of negotiations, whether the inaccuracy were caused by carelessness or by malice.

Secondly, as to the time when this statement was made. It was made after the contract relied on was complete. If an agent is employed to enter into a contract, he has no power to bind his principal by statements made by him after the business on which he was employed is completed. In truth and in fact, the letter relied on is, as Ronan L.J. pointed out during the course of the argument, merely a narrative of an event. You can prove an event by calling a party who was a witness to it, or by proving an admission of it by a party to the litigation. You cannot prove it merely by proving a narrative of it by somebody else.

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Lest some misconception should arise as to the effect of my judgment, I propose to say a word as to the admissibility of the letter as evidence at all against the defendant. A letter written to a party (plaintiff or defendant) by any person, whether his agent or not, may be admissible in evidence against such party, though it may not be evidence of facts stated in it. For example, it may be necessary to lead up to and explain the party's action, or want of action, upon it, and to found a legal inference thereon. Thus, a reply to it may amount to an adoption of it, and so on. But the admissibility of such a letter does not prove any facts it purports to state. The letter in question in this case, having regard to the time at, and the circumstances in, which it was written, as well as to the fact that, apart from the narrative of the interview, it hurts or helps nobody, may possibly not have been admissible at all; but I am clear it was not evidence of what Ross J. found it proved, namely, a verbal acceptance of the written offer of the 19th of November.

The principles I have endeavoured to state are supported by ample authority. In *Langhorn* v. *Allnutt* (1) it was held that letters of an agent to his principal, rendering him an account of the transactions he had performed for him, were not admissible as evidence of such transactions against the principal; while it was laid down that letters written by an agent in making a contract which form part of the contract, or of the res gestae, are admissible. In that case Mansfield C.J. said: "These letters are not a part of the res gestae, not letters written in the course of the transaction, and forming a part of it; but a mere narrative. We cannot, therefore, receive these letters in evidence." Gibbs J. said: "When it is proved that A is agent of B, whatever A does, or says, or writes in the making of a contract as agent of B is admissible in evidence, because it is part of the contract which he makes for B, and, therefore, binds B; but it is not admissible as his account of what passes. Now, what are these letters? They are not part of the contract itself, or of the res gestae, but they are the account which the agent renders to his principal of what he is doing. They are, therefore, not admissible." In *In re Devala Provident Gold Mining Company* (2) a shareholder in a company applied

(1) 4 Taunt. 511. (2) [1883] 22 Ch. D. 593.

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to have his name removed from the register of members on the ground that he had been induced to become a shareholder by a material misrepresentation in a prospectus issued by the company. The only evidence of the untruth of the representation was a statement made by the chairman of the company in a speech addressed by him to a meeting of the shareholders. It was held that this statement was not admissible evidence against the company, inasmuch as the chairman in making it was not acting as the agent of the company in a transaction between them and a third party, but was making a confidential report to his own principal. Though Fry J. in deciding this case uses the words "confidential report," yet, as I think, the case did not really turn on the confidential character of the report, but upon the circumstance that it was made by an agent to his principal. With this case may usefully be contrasted *Meux's Executors' Case* (1), referred to in it. In *Meux's Case* (1) a company was held bound by answers given by the directors of the company to the plaintiffs. "The statement was made by an officer of the company in a transaction between the company and a third party; the statement was part of the transaction."

The only authority against the view I take is *The Solway* (2), in which, during the hearing of an Admiralty action, Sir James Hannen held that a letter from the master of a ship to her owners was admissible as evidence against them of the facts therein stated. In a recent Scotch case, however, *Admiralty Commissioners* v. *Aberdeen Steam Trawling Company* (3), the Court of Session, consisting of the Lord President (Lord Dunedin), and Lords M'Laren, Kinnear, and Pearson, refused to follow this case, the Lord President remarking that "to hold that the report of a captain to his owners is evidence against the owners seems to me contrary to one of the best-known rules of evidence." The Court pointed out that Sir James Hannen rested his judgment largely on the admissibility of a ship's log in evidence, but he seemed to have overlooked that this was so by statute. I respectfully agree with the Scotch case, and am of opinion that the decision in *The Solway* (2) cannot be supported.

(1) [1852] 2 D. M. & G. 522. (2) 10 P. D. 137.
(3) [1909] S. C. 335.

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It, therefore, seems to me, on reason as well as on authority, that this letter is not evidence of the fact which it is sought to prove; that accordingly the plaintiff's case, so far as it rests on a verbal acceptance of the defendant's written offer, fails, and in the result I hold that the action should be dismissed, and the appeal allowed.

No argument as to the "course of the trial," so far as I could gather, was adduced before us. The Lord Chancellor has relied upon it. But I cannot hold that the defendants are estopped by anything that took place at the trial from relying on the inadmissibility of the letter to prove the fact relied upon. I cannot so hold because of two circumstances: 1, a verbal acceptance was not relied on by the plaintiff at the trial at all; 2, the document may have been admissible for other purposes. Certainly it was not worth the defendants' counsel's while to object to it unless its proof as a verbal acceptance of the offer was relied on, as it certainly was not. I am not by any means so sure as the Lord Chancellor seems to be that if Swan or Hamilton had been asked to testify to what took place at the interview they would have given such testimony as would have enabled us to conclude that the interview did constitute a verbal acceptance of the offer.

I feel bound to add that I entirely dissent from the aspersion cast by the Lord Chancellor and by Ross J. on the commercial integrity of the defendants. There is, in my opinion, nothing in the case to warrant it. Indeed, if I were at liberty to surmise what was the motive of the defendants when they changed their minds, I should think that they were actuated, not by the increase of £100, but by consideration for their tenant, Mr. Henry, with whom, for some reason or another, Mr. Hamilton did not put himself into touch. But whether this is so or not, I fail to see why a firm should be considered as untrustworthy merely because, negotiations not having been legally turned into a contract, they chose to bring their goods elsewhere.

Solicitors for the plaintiff and respondent: *Shean & Dickson.*

Solicitors for the defendants and appellants: *Martin H. Turnbull & Co.*

R. ST. J. C.

## IN RE MURPHY AND GRIFFIN'S CONTRACT.

*Powell J.*
1919.
Jan. 23.
Feb. 6.

*Settlement—Real Estate—Limitations—No words of inheritance—Equitable estate in fee—Estate for life or in fee simple—Intention—Vendor and purchaser summons—Procedure.*

A limitation in a deed of an equitable estate without words of limitation confers the equitable fee, where a sufficient indication is found on the face of the deed that an estate in fee simple is intended to pass.

Real estate was in 1883 conveyed to trustees on trusts contained in a marriage settlement dated in 1867, namely, to hold the same upon trust for the children of the marriage (save and except the eldest son) in such manner as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default for the said children in equal shares. No joint appointment was made. By deed poll dated in 1909, the wife, the survivor, in exercise of the power given to her by the settlement, appointed the said real estate to W. (one of the younger children of the marriage) "absolutely and to the intent that he should be forthwith entitled to call for . . . an assignment of . . . the lands and premises."

*Held*, that W. took an equitable estate in fee, there being a sufficient indication on the face of the deed of an intention that an equitable estate in fee should pass to W.

A vendor of the lands claiming through W. brought a summons under the Vendor and Purchaser Act, 1874, for a declaration that a good title had been shown in accordance with her contract with the purchaser who had declined to complete.

*Held*, that a good title had been shown, and that the procedure by summons under the Vendor and Purchaser Act was the appropriate remedy.

ORIGINATING SUMMONS brought by the vendor, Eveleen Murphy, of Oberstown, Sallins, in the county of Kildare, for an order declaring that the ninth of the purchaser's requisitions on the title to the hereditaments comprised in a contract of the 30th October, 1918, for the sale of certain freehold lands in the county of Wexford, made between her and William Griffin, the purchaser, and supplemental requisition similarly numbered, had been sufficiently answered by the vendor, and that good title had been shown to the said hereditaments in accordance with the contract.

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The following statement of the facts is taken from the judgment of POWELL J.:—

The lands in question were sold by public auction on the 30th October, 1918, at the price of £370, and comprised lands described in the particulars of sale, lot No. 1, as follows:—"Part of the lands of Bettyville, known on the Ordnance Survey as part of Coolcots, containing 32½ acres or thereabouts, statute measure, situate in the county of Wexford, held under fee-farm grant, dated 27th November, 1871, at the yearly fee-farm rent of £123 18*s.*, in respect of which, for some years past, a rent of £98 6*s.* has been received and paid, and also subject to an ecclesiastical tithe rent-charge of £1 18*s.* 8*d.*, and a lay rent-charge of 13*s.* 2*d.*, payable to the Earl of Portsmouth."

The title, so far as material for the purpose of these proceedings, was as follows:—By indenture, dated 9th September, 1867, and made between John Murphy of the first part, Francis John Connell of the second part, Margaret Mary Connell of the third part, and Malachi Stronge Hussey and Peter Grehan, therein called the trustees, of the fourth part, being the settlement executed in contemplation of the marriage, shortly afterwards solemnized, of the said John Murphy with Margaret Connell, it was agreed and declared that the trustees should stand possessed of a certain charge of £4000, and of a certain sum of £6000, therein mentioned, upon trust, after the solemnization of the marriage, to invest the same as therein, and during the joint lives of the said John Murphy and Margaret Mary Connell to pay and apply the dividends and income of the said several sums as therein mentioned; and after the death of John Murphy (which event occurred on the 14th April, 1909), that the trustees should hold the same upon trust for the child of all and every or such one or more exclusively of the other or others of the children of the said John Murphy by the said Margaret Mary Connell (save and except an eldest or only son or sons, who before he or they respectively should attain the age of twenty-one years should become entitled to the hereditaments known as the Mullan estate, therein particularly referred to for the first estate in tail male), who being a son or son should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry at such

ages, days, or times, and if more than one, in such shares and proportions and with such provisions for maintenance and advancement and in such manner and form as the said John Murphy and Margaret Mary Connell should during their joint lives by any deed or deeds, revocable or irrevocable, from time to time jointly appoint; and in default of and subject to any such appointment, then as the survivor of them should by any deed or deeds, revocable or irrevocable, or by his or her will or any codicil thereto appoint; and in default of and subject to any such appointment, then upon trust for the child or all other the children of the said John Murphy by the said Margaret Mary Connell (save and except an eldest or only or other son or sons becoming entitled as aforesaid), who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if more than one, in equal shares; and it was thereby declared that the said trust funds and the shares thereof respectively, whether under or in default of any such appointment, should be respectively vested interests and payable as thereinafter mentioned; and by the same indenture the said John Murphy and Margaret Mary Connell severally covenanted with the trustees that they would by good and effectual assignments and assurances or other acts and deeds pay, transfer, or assign unto or otherwise cause to be well and effectually vested in the trustees or trustee for the time being of the said settlement all and singular any money or other real, freehold, or personal property to which the said Margaret Mary Connell or the said John Murphy in her right should become at any time during the then intended coverture entitled for any estate or interest whatsoever at law or in equity exceeding £100 in value, to be held by the said trustees or trustee upon the same trusts, intents, and purposes as were thereinbefore expressed and declared of and concerning the said two sums of £4000 and £6000 as therein mentioned, or as near thereto as the nature of the property to be settled and the circumstances would admit.

Margaret Connell, widow, who was the mother of Margaret Mary Connell, died on the 1st of August, 1880, and by her will, dated the 19th December, 1876, she bequeathed numerous legacies, and devised and bequeathed all the rest, residue, and remainder of

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her estates and properties, to Margaret Mary Connell, then Margaret Mary Murphy, her heirs, executors, administrators, and assigns. Margaret Connell was at the time of her decease seised in fee of the hereditaments and premises, the subject of the contract under the fee-farm grant of the 27th November, 1871, subject to the fee-farm rent mentioned in the particulars and conditions of sale.

By indenture, dated the 23rd April, 1883, and made between the said John Murphy and Margaret Mary Murphy, of the one part, and the Right. Hon. William Henry Forde Cogan and Mathew James Corbally, who were then the trustees of the settlement of the 9th September, 1867, the original trustees having died, of the other part, the said John Murphy and Margaret Mary Murphy, pursuant to the covenant for the settlement of after-acquired property contained in the said settlement, conveyed the hereditaments, the subject of the contract, unto and to the use of these trustees in fee simple, subject to and upon the trusts and for the purposes in and by the settlement of the 9th September, 1867, declared of and concerning the said two sums of £4000 and £6000 therein mentioned, or as near thereto as the nature of the property so conveyed would admit.

There was issue of the marriage of the said John Murphy and Margaret Mary Murphy four children, namely, John Francis Murphy, who was the eldest son, William Agnew Murphy, Margaret Mary Clare Murphy, and Eveleen Mary Teresa Murphy, the last of whom is the vendor, all of whom attained their respective ages of twenty-one years.

John Francis Murphy became entitled to the Mullan estate in tail male, and so was excluded from the children of the marriage, amongst whom the sums of £4000 and £6000 might be appointed under the powers contained in the settlement. John Murphy died on the 14th April, 1909, leaving Margaret Mary Murphy, his wife, surviving him, but without having ever concurred with the said Margaret Mary Murphy in making any joint appointment under the power contained in the said settlement.

By deed poll, dated the 27th October, 1909, under the hand and seal of the said Margaret Mary Murphy, she, in the exercise of the power given to her by the settlement, irrevocably

appointed a certain sum of Government stock, and a certain sum secured by mortgage, and also the lands and premises described in the third part of the schedule to the said deed poll, to William Agnew Murphy absolutely, and to the intent that he should be forthwith entitled to call for a transfer into his name of the said sum of Government stock, and for an assignment of the said mortgage, and the securities for the same, and the lands and premises described in the third part of the said schedule. In the third part of the schedule to the said deed poll was set forth, firstly, a description of the hereditaments and premises the subject of the contract in this case.

William H. F. Cogan died, leaving Mathew James Corbally him surviving. Mathew James Corbally died on the 30th April, 1907, and on the 16th March, 1908, probate of his will was granted to Sarah Corbally, his widow.

By indenture, dated the 2nd November, 1909, and made between the said Sarah Corbally of the one part, and William Agnew Murphy of the other part, the said Sarah Corbally, as personal representative of Mathew James Corbally, deceased, in pursuance of the appointment made by the deed poll, dated the 27th October, 1909, conveyed these hereditaments and premises unto and to the use of the said William Agnew Murphy in fee simple, subject to the perpetual rent. The last-mentioned indenture is endorsed on the indenture of the 23rd April, 1883.

William Agnew Murphy died on the 26th January, 1918, having by his will, dated the 17th January, 1918, given certain pecuniary legacies, and devised and bequeathed all the rest, residue, and remainder of his estate, whether real or personal, in equal shares between his mother, Margaret Mary Murphy, and his sister, Eveleen Murphy, the vendor, both of whom he appointed to be executrices of his will. This will was, on the 20th April, 1918, duly proved by the said Margaret Mary Murphy, the right of the said Eveleen Murphy being reserved.

Margaret Mary Murphy died on the 20th September, 1918, having by her will, dated the 4th March, 1918, after certain pecuniary and specific bequests, devised and bequeathed all the rest, residue, and remainder of her property, real and personal, to her daughter, Eveleen Murphy, the vendor, absolutely, and

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appointed her said daughter and Stephen Grehan executors and trustees of her will, which, on the 18th October, 1918, was proved by Stephen Grehan, the right of the said Eveleen Murphy being reserved.

The abstract of title having been furnished, requisitions were delivered, and correspondence took place between the vendor's solicitors and the purchaser's solicitors, and ultimately the purchaser declined to complete the purchase, and the present originating summons was brought under the Vendor and Purchaser Act.

The objection to the title by the purchaser's solicitors, insisted on in these proceedings, was that the deed of appointment to William Agnew Murphy, under whose will the vendor derived her title to the lands in question, contained no words of limitation, and that William Agnew Murphy accordingly only took a life estate in the lands appointed, and that the remainder on his death went in default of appointment.

*H. Wilson K.C.*, for the vendor.
*Devitt*, for the purchaser.

*Cur. adv. vult.*

Feb. 6.

Powell J.:—

Two questions were argued before me on this summons, first, as to whether the vendor had shown a sufficiently good title, and secondly, whether, in all the circumstances, proceedings under the Vendor and Purchaser Act were appropriate. I shall deal with these matters separately.

Mr. Wilson K.C., who appeared for the vendor, contended that it is now well-settled law that the equitable estate in fee will pass under a deed without words of limitation, if a sufficient indication be found on the face of the deed that an estate in fee simple was intended to pass; and he says that there is a sufficient indication of such an intention on the face of the deed poll of the 27th October, 1909, and that the freehold interest in Bettyville passed in equity notwithstanding the absence of words of limitation.

Mr. Devitt (who appeared for the purchaser) disputed Mr. Wilson's proposition, and also contended that there was no sufficient indication to be found on the face of the deed that

an estate in fee simple should pass. Mr. Wilson cited several authorities in support of his legal proposition with which I shall now deal. He said that the foundation of the principle is to be found in the case of *Pugh* v. *Drew* (1). The head-note of that case states that if the intention of a deed be clear to pass an equitable estate in fee simple, it is not necessary that words of inheritance should be used for the purpose. By the deed of settlement certain leaseholds were settled as to one-third share thereof in trust, in the events which happened, for A and B absolutely in equal shares. In 1819 certain freeholds were settled "upon such and the same trusts and for such and the same ends, intents, and purposes and subject to such and the same powers, provisoes, and declarations as in the first-mentioned indenture were expressed, declared, and contained of and concerning the premises, or as near thereto as the difference of the respective estates of the trustees and their respective heirs, &c., would admit, to the intent that the rents, issues, and profits of the hereditaments and premises in question might be had, received and taken and held, sold, conveyed and assigned in such manner and at such times as in the said first indenture was expressed and declared concerning the premises therein particularly mentioned and described"; and it was held that want of proper words of inheritance was not fatal, and that A and B took equitable estates in fee simple and not for life only in one-third share of the freeholds.

It may not be out of place to refer to the argument of counsel for the plaintiff in the case under review. Mr. Fry (afterwards Lord Justice Fry), in support of his argument that the want of proper words of inheritance was not fatal, quoted the dictum of Lord Hobart: "I do exceedingly commend the Judges that are curious and almost subtle [astuti] to invent reasons and means to make acts according to the just intent of the parties and to avoid all injury which, by rigid rules, might be wrought out of the Act." Vice-Chancellor James in giving judgment for the plaintiffs said: "Some cases were cited to the effect that a conveyance to A and his heirs in trust for B only gives B a life estate, but Mr. Simpson was obliged to go further and to maintain that the want of words of inheritance is absolutely fatal

(1) 17 W. R. 988.

*Powell J.* 1919. *In re* MURPHY AND GRIFFIN'S CONTRACT.

under all circumstances. There is no doctrine of this Court which compels me to maintain such nonsense." This is a somewhat severe criticism of Mr. Simpson's argument, and I do not intend to follow the learned Judge to the extent of applying the same criticism to Mr. Devitt, who argued this case with great ability, and in my opinion left no point uncovered. It is, I think, plain from the report of this case that the learned Vice-Chancellor found the intention of the deed in question to pass an equitable estate in fee simple without words of inheritance in the circumstance that there was a deed settling leasehold in trust for *A* and *B*, their executors, administrators, and assigns, and freeholds upon the same trusts, or as near thereto as the circumstances of the case would admit.

Undoubtedly, subsequent to the decision in *Pugh* v. *Drew* (1) there was a conflict of authority on the question as to whether an equitable estate in fee simple may be limited without the use of technical words, even when it appears that it was the intention of the grantor to dispose of the whole estate; that the conveyance or declaration of trust of an equitable estate was subject to the same rule as a conveyance of a legal estate, and that the absence of proper words of limitation could not be cured by ascertaining the intention of the grantor. Vice-Chancellor Chatterton in *Meyler* v. *Meyler* (2), and Kenny J. in *Bennett's Estate* (3) so decided; but I think that Mr. Wilson has established that first in England and later on in this country the current of later authorities has flowed in an opposite direction, to quote an expression of the present Master of the Rolls in a case to which I shall refer later.

In *In re Tringham's Trusts* (4), the head-note is as follows:— "A limitation in a deed, of a trust of real estate for A., without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shown upon the face of the instrument. By surrender and a settlement dated in 1831, copyhold hereditaments were limited in trust for M. for life, and after her death for her husband, and after the death of the survivor in trust for the children of the marriage equally

(1) 17 W. R. 988.
(2) 11 L. R. Ir. 522.
(3) [1898] 1 I. R. 185.
(4) [1904] 2 Ch. 487.

as tenants in common, and in default of issue then to such uses as M. should declare by her will, with remainder to the right heirs of M. There were three children of the marriage. Held, that there being upon the face of the instrument sufficient indication of intention on the part of the settlor that absolute interests should be given, the three children, notwithstanding the absence of any limitation to their heirs, were entitled as tenants in common in equal shares for equitable estates in customary fee simple."

Mr. Justice Joyce in his judgment refers to Mr. Butler's note to Coke upon Littleton, which says:—"A mere declaration of trust in favour of another has been held sufficient to transfer to him the equitable fee." The learned Judge also refers to the statement of Mr. Hayes in the 5th ed., vol. i, of his Introduction to Conveyancing, in which he said: "Trusts, like uses before the statute, pursued the course of succession appointed for legal interests of a corresponding description. They were expounded, too, by analogy to the rules of legal construction. But those rules did not always govern in equity with absolute sway. The rule, for example, which required the word 'heirs' to pass the fee in a conveyance at common law, although it was extended to uses within the statute, was not rigidly applied to trusts. If land was limited in trust for A, without more, Equity, in conformity to the rule of Law, gave to A the beneficial interest for life only; but if it could be collected from the instrument that A was meant to have the absolute interest, Equity, esteeming the intention more than the rule, gave him the beneficial fee without the aid of the word 'heirs.'" He also refers to Lewin on Trusts, 10th ed., p. 117, where he says the rule is thus stated:—"In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs,' and an equitable entail without the words 'heirs of the body,' provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument." The learned Judge then deals with certain authorities which he points out had been cited in the argument before Vice-Chancellor James in the case of *Pugh* v. *Drew* (1), and says that

(1) 2 W. R. 988.

*Powell J.* 1919.

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the Vice-Chancellor ridiculed the proposition that the want of words of limitation was absolutely fatal in all circumstances. He says that he looked up and referred to the order itself in that case, which shows that the fund in Court representing the proceeds of the freeholds was paid out and distributed upon the footing that A and B were absolutely entitled. Mr. Justice Joyce then referred to the case of *In re Whiston's Settlement* (1), where the limitation in a settlement was "in trust for such child or children of the settlor as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain the age of twenty-one years or be married under that age, which shall first happen, the same to be, if only one such child, paid, assigned, or transferred unto him or her solely, or if two or more such entitled children, then to be paid, assigned, or transferred in equal shares as tenants in common," in which case Mr. Justice Chitty, having examined the instrument and finding no expression of a sufficient indication of intention on the part of the author of the instrument that absolute interests should be given, considered that he had merely to deal with and construe the limitation to children as tenants in common. Mr. Justice Joyce said that this decision had not been universally approved of, and that it had been thought by some that if the Court had been astute to find in that case sufficient indication of intention to confer absolute interests upon the children, it might have succeeded in doing so. He then says:—"The result is, that where an intention to confer more than a life estate is not expressed or sufficiently shown upon the face of the instrument, then, in a deed, a simple trust of real estate to A, without any mention of the heirs, does not give more than a life estate. No case, however, had been cited where such a limitation of a trust has not been held to confer the equitable fee where the intention to do so was expressed or sufficiently shown upon the face of the instrument"; and he goes on to say: "*Pugh* v. *Drew* (2) is a distinct authority that in a deed a limitation of a trust, the plain intention of which is to confer an equitable fee, can have that effect without the use of the word 'heirs.'" The concluding passage of his judgment is: "I may add, that if I could not have seen my way thus to determine

(1) [1894] 1 Ch. 661. (2) 17 W. R. 988.

as a matter of construction of the deed, then, having regard to [two cases to which he referred], I should have had most seriously to consider whether I ought not to rectify the declaration of trust in this case by the insertion of the word 'heirs' where it is supposed to be required."

In *In re Oliver's Settlement* (1), a case in which this question arose, Mr. Justice Farwell said:—"The law upon this point has been very recently stated by Mr. Justice Joyce in *In re Tringham's Trusts* (2), and I need not, therefore, state it again." His Lordship read the first paragraph of the head-note of that case, and proceeded:—"I adopt that as a correct statement of the law, and all I have to consider is whether in the case before me there is sufficient to show an intention that the children should take the fee. I think there is. The trustees are directed to convey the trust estate to the children, and that naturally means all the estate they had."

In *In re Houston* (3), by an indenture of settlement of the 3rd July, 1897, certain lands were conveyed to trustees to hold in trust for persons named as tenants in common. There were no words of limitation of the respective estates to the persons named; and Mr. Justice Wylie refused to follow *Meyler* v. *Meyler* (4), having regard to subsequent authorities, and held that the Court was at liberty to look at the intention of the settlor as evidenced by the whole deed, and that there being a sufficient indication of intention, the persons named were entitled to equitable estates in fee simple.

In *In re Ottley's Estate* (5) the same learned Judge held that sect. 45 of the Fines and Recoveries (Ireland) Act (4 & 5 Wm. 4, c. 92), sect. 47 of 3 & 4 Wm. 4, c. 74, while prohibiting any Court from transforming by the application of any equitable doctrine a deed which according to its legal construction is ineffective to bar an entail into a valid disentailing assurance, does not take away the general jurisdiction of a Court of Equity to rectify a disentailing deed so as to bring its provisions into conformity with the actual intention of the parties; that, having

(1) [1905] 1 Ch. 191.
(2) [1904] 2 Ch. 487.
(3) [1909] 1 I. R. 319.
(4) 11 L. R. Ir. 522.
(5) [1910] 1 I. R. 1.

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regard to the terms of the deed in question (in the case before the learned Judge), the words "in fee" were capable of being and should be construed as meaning "in fee simple"; and accordingly that under sect. 51 of the Conveyancing Act of 1881 the deed was effectual to pass an estate in fee simple.

Two cases of great weight on this point were decided in the year 1915, one of them in England and the other in Ireland. *Nutt's Settlement* (1) was argued on the 21st and 22nd July, 1915, and the judgment, I take it, was given shortly afterwards. In the same month the Master of the Rolls in Ireland delivered a judgment in the case of *Cross's Trusts* (2). The Master of the Rolls was not, of course, aware of the judgment of Mr. Justice Neville in *Nutt's Settlement* (1), because the case was not then reported; but in each of these cases the learned Judge who delivered judgment reviewed practically all the authorities, and came to the same conclusion. On referring to the report in *Nutt's Settlement* (1) it will be found that practically all the cases referred to by Mr. Devitt were referred to by counsel in the argument or by the learned Judge in his judgment. By a settlement land was assured to the trustees and their heirs upon certain trusts during the life of A. B., and after her death to the use of her children as she should by deed appoint. By a deed poll A. B. appointed that the trustees should after her death hold the trust funds and property in trust for her four sons in equal shares, without words of limitation. At the date of the appointment some of the lands had been sold, and the property consisted partly of land and partly of money, subject to a trust for investment in land. Held, 1, that the appointees took equitable and not legal estates; and, 2, that although the gift by deed of an equitable estate in land without words of limitation passes only a life estate, the fee may pass if there is to be found in the construction of the deed as a whole an intention that it should pass, and that such an intention is shown by the fact that a gift of land is coupled with a gift of money, subject to a trust for investment in land which would pass absolutely without words of limitation. *Dearberg* v. *Letchford* (3), a case strongly relied upon by Mr. Devitt, was

(1) [1915] 2 Ch. 431. (2) [1915] 1 I. R. 304.

(3) 72 L. T. 489.

not followed. Mr. Justice Neville says in his judgment:—"It seems to me, if I can find out what the effect of the appointment would have upon the part of the property mentioned, I have some guide by which I might ascertain what was intended with regard to the rest, because the trust fund and property are treated as one and the same, and devoted, as it seems to me, to the same destination. First, with regard to the moneys or funds which represent the sale of the real estate. With one exception I can find no authority in which it has been held that in order to pass an absolute interest in money—whether it is the proceeds of sale of real estate or not, whether it is devoted to the repurchase of real estate or not—where there is a life interest, words of limitation are necessary. I should be very loth to carry the doctrine of notional conversion in equity to such an extreme length. It is said, and I think truly, that *Dearberg* v. *Letchford* (1) is an authority to that effect." Later on he says: "It seems to me when one has arrived at the conclusion with regard to the money considerable light is thrown on the proper construction to be put upon the whole appointment." He then says that the outcome of the cases bearing upon the point, in his opinion, is this: "With regard to the granting of equitable estates, a grant of land upon trust for A passes to A if there is nothing more, only a life estate; but words of limitation with regard to an equitable estate are not indispensable, because I think that what estate is given to a beneficiary depends upon the construction of the document purporting to give him the benefit, and must be determined by the whole of the deed or document which has to be interpreted. I think, therefore, that if you can find in the documents themselves, or in the document itself that you have to examine, a sufficient indication of a desire to pass, not a life estate, but an equitable estate in fee, that intention must prevail." He then deals with the decision of Buckley J. in *In re Irwin* (2), in which he says that the learned Judge "appears at first sight to have come to an opposite conclusion"; but he says: "I am not at all sure that he did in principle . . . I am not convinced that he [Mr. Justice Buckley] did not think that in the case before him there was no sufficient indication of intention contained in the deed to enable

(1) 72 L. T. 489. (2) [1904] 2 Ch. 752.

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him to say that, in spite of the absence of words of limitation, it was intended that the equitable fee should pass. However that may be, that case has been since considered and distinguished on the ground that there the question was what estate the trustee took, and not what estate was given to the beneficiary. Speaking for myself, I think it undesirable to raise a distinction between the two cases. I think that in the construction of deeds dealing with equitable estates, the Court should put such a construction upon the covenant or grant as may be consistent with the intention expressed in the whole deed. When I come to this deed I think I should be deliberately hiding from myself the intention of the appointor if I did not take into consideration the context to the gift of the land. The land is, of course, more popularly described as property than as trust funds, and we may assume that the word 'property' was intended to deal with the land; but it is clear, to my mind, that the appointor desired a full and complete interest, both in the trust fund and in the property, to pass in equal shares to the sons she has named. It would be doing injustice to the words used if one were to read those words as meaning the trust funds are to go in equal shares amongst her sons, but the property is only to go to them as tenants in common for life. I do not think anybody fairly reading this document could come to the conclusion that that was the intention of the appointor. I am of opinion, therefore, that the named sons take both the trust funds and the unsold real estate in equal shares absolutely."

In the case of *Cross's Trusts* (1) the head-note is "A limitation in a deed of an equitable estate without words of limitation may confer an equitable fee where the intention to do so appears from the deed." The Master of the Rolls held that there was sufficient evidence on the face of the instrument in question to show that it was the intention of the settlor to dispose of his whole estate, and that the younger children, notwithstanding the absence of words of inheritance in the limitation to them in default of appointment, took an equitable estate in fee simple as tenants in common in equal shares in the lands. He followed

(1) [1915] 1 I. R. 304.

the decision in *In re Tringham's Trusts* (1); *In re Houston* (2); and *In re Stinson's Estate* (3); but refused to follow *Meyler* v. *Meyler* (4) and *Bennett's Estate* (5). He reviewed the law as laid down in all the authorities, and referred to the case of *In re Thursby's Settlement* (6), much relied upon by Mr. Devitt, in which Mr. Justice Farwell (who, as a Judge of the Chancery Division, had decided *In re Oliver's Settlement* (7), to which I have already referred), when he was sitting in the Court of Appeal, said that he never decided, and did not think that an appointment of equitable interests in land to A, or to a class, without words of limitation, could carry more than a life interest to the appointee, but the Master of the Rolls points out that the learned Lord Justice said, "It is not absolutely necessary to have the technical words as in the case of legal estates in land, but there must be circumstances, such as Joyce J. found in *In re Tringham's Trusts* (1), and I found in *In re Oliver's Settlement* (7), to show an intention that the fee should pass." There is, therefore, says the Master of the Rolls, no uncertainty about the law as laid down by the English Courts. He says he would consider himself bound by the judgments in *Meyler* v. *Meyler* (4) and *Bennett's Estate* (5) were it not that the English decisions have been recently followed in this country, and he refers to the case of *In re Houston* (2), and to the decision of Mr. Justice Wylie, and to a judgment of Mr. Justice Ross in *In re Stinson's Estate* (3), and says he has therefore to determine whether the conveyance sufficiently indicates an intention to dispose of the entire equitable estate in fee, and he says:—"On the whole deed I am convinced that it was the intention to dispose of the whole estate"; and he then declared that the plaintiff and the defendant took an equitable estate in fee simple as tenants in common in equal shares in the lands settled by the deed.

Mr. Devitt, in support of his contention, relied upon *Meyler* v. *Meyler* (4), *Whiston's Settlement* (8), *Dearberg* v. *Letchford* (9),

(1) [1904] 2 Ch. 487.
(2) [1909] 1 I. R. 319.
(3) [1910] 1 I. R. 47.
(4) 11 L. R. Ir. 522.
(5) [1898] 1 I. R. 185.
(6) [1910] 2 Ch. 181.
(7) [1905] 1 Ch. 191.
(8) [1894] 1 Ch. 661.
(9) 72 L. T. 489.

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*In re Irwin* (1), *Thursby's Settlement* (2), and *Monckton's Settlement* (3); all of which are referred to in the cases that have been cited, and it is, therefore, not necessary for me to deal further with them.

On the authorities, I must hold in favour of Mr. Wilson's contention that the equitable estate in fee will pass under a deed without words of limitation if a sufficient indication be found on the face of the deed that an estate in fee simple should pass. Is there a sufficient indication of intention to be found in the deed poll of the 27th October, 1909, that an estate in fee simple should pass? I think there is. The appointment admittedly passed £2000 Government Stock and a £3500 mortgage, and the two chattel interests in Bettyville absolutely, and I think it would be doing an injustice to the words used if one were to read these words as meaning that the Government Stock, mortgage, and the chattel interests were to go to William Agnew Murphy absolutely, but that the lands were only to go to him for life. I do not think anybody fairly reading this document would come to the conclusion that that was the intention of the appointor. Moreover, that intention is, I think, to be gathered from the words "to the intent that William Agnew Murphy shall be forthwith entitled to call for a transfer into his name of the said sum of £2000 Government Stock, and for an assignment to him of the said mortgage for £3500 and the securities for the same, and the said lands and premises described in the third part of the schedule hereto."

Mr. Devitt drew attention to the fact that the word used in that connexion is "assignment" and not "conveyance"; but it will be observed that in the case of *In re Irwin* (4), already referred to, and upon the decision in which Mr. Devitt so strongly relied, Mr. Justice Buckley says: "I do not seek to attribute any importance to the verb 'assign.' The deed does not say 'grant' or 'convey' or 'assure,' which would be proper verbs to use, no doubt, but says 'assign.' If it had said 'assign to trustees and their heirs,' I have no doubt the words would be sufficient to pass the fee simple, so that, as far as the word 'assignment' is concerned, I do not think that the use of that word, instead of

(1) [1904] 2 Ch. 752.
(2) [1910] 2 Ch. 181.
(3) [1913] 2 Ch. 636.
(4) [1904] 2 Ch. 752.

'conveyance' or 'assurance,' per se is sufficient to prevent me from finding a sufficient indication of a desire to pass not a life estate, but an equitable estate in fee."

But Mr. Devitt further contends that proceedings under the Vendor and Purchaser Act are misconceived, and that an action for a declaration of title is the appropriate remedy, and he relies on *In re Nichol's and Von Joel's Contract* (1). In that case a question of construction involving real difficulty came to be determined upon an originating summons under this Act. Mr. Justice Neville held that the title was too doubtful to force upon a purchaser, and offered to adjourn the case to enable the vendors to take out an originating summons. The vendor declined, and on the appeal the Court made the same offer, which was accepted. Upon the originating summons the question of construction was decided in favour of the vendors, and on the adjourned hearing of the appeal it was declared that the vendors had shown good title, and the order of Mr. Justice Neville was discharged in the subsequent matter, but it was held that the vendors ought to pay the costs of the appeal and the Court below, and the Master of the Rolls pointed out that when there is a real difficulty or doubt in construing a will, it was not right for the Court to force a title upon a purchaser, which might merely mean that he was buying a lawsuit. Nobody could question that decision, having regard to the particular facts of that case and the difficulties in question. In *Alexander* v. *Mills* (2), referred to by Mr. Wilson in this part of the argument, which was a suit for specific performance on a vendor and purchaser summons, the Master of the Rolls had dismissed the action, and there was an appeal from the decision, and counsel for the respondent in his argument said that the matter at issue involved a point of great nicety never before expressly decided. Sir William James delivered the decision of the Court of Appeal, reversing the Master of the Rolls, and in delivering the judgment said:—"We do not say that there may not be cases in which a question of law may be considered so doubtful that a Court would not on its own view compel a purchaser to take the title; still as a general and almost universal rule a Court is bound, as much between vendor and purchaser as

(1) [1910] 1 Ch. 43. (2) L. R. 6 Ch. App. 124.

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in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined."

In *Cattell* v. *Corrall* (1), which was a suit for specific performance, Alderson B. says:—"I quite agree that a purchaser ought not to be compelled to take such a title as on reasonable grounds might be litigated, but then there must be a reasonable decent probability of litigation." [The learned Judge next referred to *Mogridge* v. *Clapp* (2), and proceeded.]

In *In re Carter and Kenderdine's Contract* (3), a vendor and purchaser's summons, Lindley L.J. said that the point was extremely important that the objection taken by the purchaser was a very formidable one, that the question had arisen previously, that Mr. Justice Stirling had held the objection to be so serious that he could not force a similar title on the purchaser, that, on the other hand, Vaughan Williams J., who considered the question from a somewhat different point of view, had come to the conclusion that a purchaser would get a good title. The Court of Appeal supported Mr. Justice Vaughan Williams' view on the point, and decreed specific performance, notwithstanding Mr. Justice Stirling's view. Lindley L.J. said:—"I am of opinion that the purchaser will get a perfectly good title, and, in order not to throw a cloud upon it, he will pay the cost of the litigation."

In this case, having arrived at the clear conclusion that Mr. Wilson's proposition of law is sound and borne out by the authorities, and having come to the conclusion that the intention that an equitable estate in fee should pass is indicated on the face of the instrument in question, and that therefore the title to these hereditaments is not doubtful, I must give effect to that conclusion by declaring that the requisition in question has been sufficiently answered, and that good title has been shown in accordance with the contract.

Solicitors for the vendor: *Roche & Son.*
Solicitors for the purchaser: *Huggard & Brennan.*

D. M. S.

(1) 4 Y. & C. 228. (2) [1892] 3 Ch. 382. (3) [1897] 1 Ch. 776.

# IN RE RAMADGE'S SETTLEMENT. HAMILTON *v.* RAMADGE.

(1918. No. 992.)

*M. R.*
1918.
Dec. 12.
1919.
Feb. 12, 13, 14.
March 20.

*Settlement—Rule against perpetuities—Invalid settlement confirmed by subsequent instrument—Time from which the period allowed by the rule against perpetuities should be calculated—Annuity—Appointment of life estates contingent on survivorship—Alternative or dependent appointment—Limitation of annuity—Merger—Perpetual annuity secured by term of 1000 years—Realty or personalty—Power to redeem annuity—Perpetuity.*

A settlor, who was in fact tenant in tail of certain lands, by indenture, dated the 17th September, 1855, executed on the marriage of his eldest son A., purported to create a perpetual rentcharge out of the inheritance of the said lands, to be held in trust for A. for life, with remainder in trust for the intended wife for her life, with remainder in trust for the issue of the marriage as the husband or wife should appoint, and in default of appointment for the issue of the marriage and their heirs equally; and by the same indenture the lands were demised to trustees for the term of 1000 years, upon the usual trust for securing payment of the rentcharge. The settlement also contained a provision that the person or persons for the time being beneficially entitled to, or in possession of, the reversion and inheritance of the lands should be at liberty to extinguish the said rentcharge, and discharge the lands therefrom by the payment of a capital sum to the trustees. This indenture was not enrolled as a disentailing assurance. After the death of the settlor, A. executed an indenture, dated the 23rd April, 1868, duly enrolled as a disentailing assurance, whereby, after reciting that he was seised of the lands as tenant in tail, and that he was desirous of carrying out his father's intentions, he granted the lands to the then trustees of the indenture of 1855 for the term of 1000 years from the 17th September, 1855, upon the trusts and with the powers in the said indenture of 1855 declared, and subject thereto to the use of himself in fee simple.

There were issue of the marriage of A. three sons and three daughters, all of whom were born before the execution of the indenture of 1868.

In 1877 A. made his will, whereby, in professed exercise of the power conferred upon him by the indenture of 1855, he appointed the said rentcharge to his two younger sons, in equal shares, during their respective lives, and upon the death of one or both of them he appointed that a portion or the whole of the said rentcharge should be divided in equal shares between such of his three daughters as should be then living, for their joint lives, and for

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the survivor of them during her life; and after the death of the survivor of all his younger children he appointed the rentcharge to his eldest son B. "to the intent that the same might merge and be extinguished in the inheritance of the lands charged therewith."

In 1881 A. executed a deed poll whereby, after reciting that under the will of his father (the settlor in the indenture of 1855) the lands out of which the rentcharge issued stood limited upon trust for himself for life, with remainder to his first and other sons as he should appoint, and in default of appointment to the use of his first son who should attain the age of twenty-one years in fee simple, he released the said lands from the said power of appointment.

By an indenture of the 17th October, 1881, the lands were settled upon A. for life with remainder to B. (his eldest son) for life, with remainder to the first and other sons of B. successively in tail male, with remainders over.

A. died on the 21st June, 1887, leaving his six children him surviving. B. died in 1892 without issue.

*Held*—1. That the indenture of 1868 must be read as relating back to the indenture of 1855 for the purpose of setting up the limitations contained in the earlier deed. 2. That the appointments of the rentcharge made by the will of A. must be treated as appointments made under the indenture of 1855, and that, as it might not be ascertainable within the period allowed by the rule against perpetuities which of the daughters of A. would survive their brothers, the appointment to them was bad: *Whitby* v. *van Luedecke*, [1906] 1 Ch 783. *In re 'Thatcher's Trusts*, 26 Beav. 365, followed. 3. That the appointment of the rentcharge after the death of the survivor of A.'s younger children to B. failed as being dependent upon a prior invalid appointment. 4. That the rentcharge was personal estate. 5. That the provision in the indenture of 1855 for the redemption of the rentcharge violated the rule against perpetuities. *Tyrrell's Estate*, [1907] 1 I. R. 292, followed.

ORIGINATING SUMMONS ADJOURNED INTO COURT.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

This matter raises several questions of great difficulty arising out of settlements affecting lands. By indenture, dated 17th September, 1855, made between Smith Ramadge (who has been described in this matter as Smith Ramadge the second) of the first part; Smith Ramadge, his eldest son (who has been described as Smith Ramadge the third), of the second part; John Godwin, of the third part; Rose Godwin, his daughter, of the fourth part; and certain trustees of the fifth part (being the settlement executed on the marriage of Smith Ramadge the third

with Rose Godwin), Smith Ramadge the second granted to the trustees and the survivor of them, his heirs and assigns, a perpetual yearly rentcharge of £200, payable out of the lands of Corballis, Dundirk, and Shalvinstown, in the County of Meath; and in order more effectually to secure this rentcharge he demised to the trustees and the survivor of them, his executors, administrators and assigns, the said lands for the term of 1000 years upon the usual trusts to secure the rentcharge. It was afterwards declared by the indenture that the trustees should stand possessed of the rentcharge upon trust for Smith Ramadge the second, his heirs and assigns, until the intended marriage, and after the marriage upon trust to pay same to Smith Ramadge the third for life determinable on bankruptcy, and after his death or bankruptcy to pay same to Rose Godwin for her life, and after the decease of the survivor of them, to pay same to the children of the marriage, or their issue born in the lifetime of Smith Ramadge the third and Rose Godwin, or the survivor of them, as the said Smith Ramadge the third should by deed or will appoint, and in default of and subject to any such appointment as Rose Godwin, should she survive her husband, should in like manner appoint, and in default of and subject to any such appointment to pay, assign, and transfer the rentcharge to and amongst all and every the children, if more than one, of the marriage equally, share and share alike, and their respective heirs and assigns, as tenants in common and not as joint tenants. There was also in the settlement a clause purporting to enable any person or persons for the time being interested in the lands to redeem the annuity by payment to the trustees of a sum of £4000.

By his will, dated the 3rd April, 1859, Smith Ramadge the second, after reciting the settlement I have stated, and noticing a mistake in the description of the lands, which it is not necessary to go into, confirmed the settlement, with the necessary amendment for the purpose of identifying the lands charged with the rentcharge. He then devised all his lands to trustees upon trust as to certain lands of Faganstown for his son, Henry George Ramadge, his heirs and assigns, and upon trust as to all the rest of his real and freehold estates, subject to the rentcharge, for his son, Smith Ramadge the third, for his life, and after his death for

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his first and other sons and their issue male in such shares and proportions, and subject to such charges for all or any of such sons, as Smith Ramadge the third should by deed or will appoint, and in default of appointment for the use of the first son of Smith Ramadge the third, who should attain the age of twenty-one years, his heirs and assigns; and if there should be but one such son who should attain that age, then upon trust for such one son, his heirs and assigns; and if there should be no issue male of Smith Ramadge the third who should attain the age of twenty-one years, then upon trust for Henry George Ramadge for life, with remainders over.

Smith Ramadge the second died on the 10th January, 1866, and his will was admitted to probate on the 31st January, 1866. Some time after his death it was discovered that the title of Smith Ramadge the second to the lands which were comprised in the settlement of the 17th September, 1855, and which he had devised by his will, was that of a tenant in tail, and that he had never barred the estate tail. The result was that Smith Ramadge the third, the eldest son of Smith Ramadge the second, became, on the death of the latter, tenant in tail of all the lands unaffected by the settlement or will.

Smith Ramadge the third was a gentleman of high principle, and he was unwilling to profit by the oversight of his father's legal advisers. Accordingly, he determined to set the matter right by executing such a deed as would carry out the intentions of his father as manifested by the settlement and will. This he did by the following deed. By indenture, dated 23rd April, 1868, made between Smith Ramadge the third of the first part, Henry George Ramadge (his brother) of the second part, Thomas Hopkins of the third part, and Henry Battersby and Wm. Neilson Hancock, of the fourth part, reciting that under the will of Smith Ramadge the first (father of Smith Ramadge the second), and in the events which happened, Smith Ramadge the second became entitled as tenant in tail to the lands therein mentioned, and reciting that Smith Ramadge the second had only two sons, that is Smith Ramadge the third, his eldest son, and the said Henry George Ramadge, his second son, and reciting the indenture dated the 17th September, 1855, and the will of Smith Ramadge the

second, and that he died without having barred the estate tail limited to him by the will of his father, and reciting that it was considered that in consequence of the omission of the said Smith Ramadge the second to bar his estate tail in the lands, the settlement of 1855 and the will of 1859 were inoperative, and that all the said lands were then vested in Smith Ramadge the third as tenant in tail in possession under the will of Smith Ramadge the first, and reciting that Smith Ramadge the third was satisfied that it was his father's intention to make an effectual settlement of the annuity of £200 or of the £4000, the redemption price of the same, and that it was also his intention to devise the said lands of Faganstown to Henry George Ramadge for an estate in fee simple, and that he desired and had agreed to give effect to such intention, and that he also desired and had determined to limit the lands, save Faganstown, to the use of himself in fee simple, but subject as to the lands comprised in the indenture of 1855 to the annuity of £200, or the redemption price thereof, and that it had also been agreed that Henry George Ramadge should join in executing the indenture I am now stating, and reciting an indenture of even date, whereby Smith Ramadge the third, in pursuance of the agreement, conveyed the lands of Faganstown to Henry George Ramadge in fee simple: it was witnessed that in further pursuance of the agreement Smith Ramadge the third granted and conveyed, and Henry George Ramadge granted and confirmed, to Thomas Hopkins and his heirs all the said lands, save the lands of Faganstown, to hold to Thomas Hopkins and his heirs, freed and discharged from the estate tail of Smith Ramadge the third under the will of Smith Ramadge the first, to the uses thereinafter declared, that was to say, as to the lands comprised in the indenture of 1855, to the use of Henry Battersby and Wm. Neilson Hancock (then the trustees of the indenture of 1855), their executors, administrators, and assigns, for the term of 1000 years to be computed from the 17th September, 1855, upon and for the trusts and purposes and with the powers in the last-mentioned indenture declared of and concerning the term of years thereby purported to be limited, and in ratification and confirmation of the same term, and subject thereto to the use of Smith Ramadge the third, his heirs and assigns, for

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ever. This indenture was duly enrolled as a disentailing assurance, and the estate tail created by the will of Smith Ramadge the first was duly barred, and Smith Ramadge the third became entitled as tenant in fee simple to all the lands save those which had been limited to Henry George Ramadge.

The next document is the will of Smith Ramadge the third, dated 13th October, 1877, and by it, after reciting the settlement of 1855, and that he had issue of his marriage three sons and three daughters, and after reciting the will of Smith Ramadge the second, the testator, Smith Ramadge the third, in professed exercise of the power given to him by the settlement and of every other power enabling him, appointed that after the decease of the survivor of himself and his wife the said annuity of £200 should be held in trust for his two younger sons, Henry George Ramadge (the younger) and John Godwin Ramadge, in equal shares during their respective lives, and no longer, and upon the death of one or both of his said two younger sons he appointed that a portion or the whole, as the case might be, of the said annuity of £200 should go and be divided in equal shares between such of his three daughters, Helen Louise Ramadge, Rose Elizabeth Ramadge, and Catherine Mary Ramadge, as should be then living for their joint lives and the survivor of them during her life, and after the death of the survivor of all his younger children, then he appointed the whole of the annuity of £200 to his eldest son, Smith Ramadge Ramadge, to the intent that the same might merge and be extinguished in the inheritance of the lands charged therewith; and the testator also in professed exercise of the power of charging given him by the said recited will of Smith Ramadge the second, and of every other power thereunto enabling him, charged all the real and freehold estates thereby devised and subject to be so charged with an annuity of £150 for his said two younger sons Henry George Ramadge and John Godwin Ramadge and their assigns respectively, in equal shares, during their respective lives; and also in professed exercise of the said powers appointed all the real and freehold estates in the county Meath devised by the said will of Smith Ramadge the second to the use of his eldest son Smith Ramadge Ramadge in tail male, with remainder to his second son Henry George Ramadge in tail male,

with remainder to his third son John Godwin Ramadge in tail male.

Now, reading this will, it is evident that the draftsman had not before him the deed of 1868 under which the testator had become tenant in fee of the lands. If he knew the contents of that deed he would not have framed the will so as to dispose of the lands by the exercise of a power. He would have proceeded with a devise of the lands by a testator who had the whole estate therein vested in himself. Nothing, however, turns upon this.

Smith Ramadge the third died on the 21st June, 1887, leaving him surviving his said six children, and his will was proved on the 13th July, 1888. In the interval between the date of his will and his death Smith Ramadge the third executed two further deeds. One of these was a deed poll, dated 17th October, 1881, releasing the lands from the powers of appointment vested in him by the will of Smith Ramadge the second. This was evidently prepared in ignorance of the deed of 1868, but it does not concern us in the present case.

The other was an indenture of even date made between Smith Ramadge the third of the first part, the said Smith Ramadge Ramadge of the second part, and Henry George Ramadge and George Henry of the third part, whereby, after reciting that under the will of Smith Ramadge the second and the deed poll of even date, the lands stood limited to the use of Smith Ramadge the third during his life and after his death to the use of Smith Ramadge Ramadge in fee simple, but subject to the rent-charge of £200 and other incumbrances, it was witnessed that Smith Ramadge the third and Smith Ramadge Ramadge granted the lands to the parties thereto of the third part and their heirs to the use of Smith Ramadge the third during his life, and after his death to the use of Smith Ramadge Ramadge during his life, and after his death to his sons in tail male, with remainder to the use of such son of the said Smith Ramadge the third other than the said Smith Ramadge Ramadge as he should by deed or will appoint, with remainders over. This indenture was likewise prepared in ignorance of the deed of 1868, but it was operative, as Smith Ramadge the third, one of the conveying parties, had the whole estate in fee simple vested in him, and it had the effect of

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overriding that part of the will of Smith Ramadge the third which purported to appoint the lands to Smith Ramadge Ramadge in tail male.

It is also to be mentioned that the six children of Smith Ramadge the third, viz., Smith Ramadge Ramadge, Henry George Ramadge the younger, John Godwin Ramadge (since deceased), Helen Louise Ramadge, Rose Elizabeth Ramadge, and Catherine Mary Ramadge were born before the execution of the indenture of the 23rd April, 1868.

The following facts also appeared from the affidavit filed to ground the summons:—

The wife of Smith Ramadge the third died in the year 1890 without having exercised the power of appointment reserved to her by the indenture of the 17th September, 1855, and the rent-charge thereupon became payable to Henry George Ramadge and John Godwin Ramadge in equal shares. Smith Ramadge Ramadge died on the 5th November, 1892, without having had issue; and the lands out of which the rent-charge issued thereupon vested in Henry George Ramadge, as tenant in tail under the indenture of the 17th October, 1881, who in 1893, on the occasion of his marriage, executed a disentailing assurance and conveyed the lands to John P. C. Crosslé and Henry D. Joliffe upon certain trusts by way of marriage settlement. The lands were subsequently sold under the Land Purchase Acts, and the redemption price of the rent-charge was fixed at the sum of £4818 3*s.* 7*d.*, which was paid to the plaintiffs, who, by order of the Land Commission, were appointed trustees for the purposes of the Settled Land Acts of the settlement created by the indentures of 1855 and 1868. The purchase price of the lands was paid to the trustees of Henry George Ramadge's marriage settlement. John Godwin Ramadge died on the 19th May, 1918, and questions thereupon arose as to who was entitled to the redemption price of his moiety of the rent-charge. This summons was taken out by the trustees of the settlement subsisting by the joint operation of the indentures of the 17th September, 1855, and the 23rd April, 1868, and the will of Smith Ramadge the third, dated the 13th October, 1877, for the determination (amongst others) of the

questions: 1, whether the appointment made by the will of Smith Ramadge the third was valid with respect to the reversionary life interests in the rent-charge of £200 appointed to such of the testator's daughters, the defendants, Helen Louise Thompson, Rose Elizabeth Ramadge, and Catherine Mary Joliffe, as should be living at the respective deaths of the testator's sons; 2, whether the reversionary appointment of the said rent-charge made by the said will to the testator's eldest son, Smith Ramadge Ramadge, after the deaths of the testator's other children, was valid; 3, whether the proviso that the said rent-charge should be at any time redeemable at the price of £4000 by the person entitled in possession to the reversion and inheritance or the rents and profits of the lands charged herewith was valid; 4, whether the said rent-charge was real or personal estate.

The defendants to the summons were Henry George Ramadge, the three daughters of Smith Ramadge the third, Wilhelmina F. R. Ramadge, the widow and personal representative of John Godwin Ramadge and universal legatee and devisee under his will, and John P. C. Crosslé and Henry D. Joliffe, the trustees of Henry George Ramadge's marriage settlement.

A question having arisen at the hearing as to whether the interest of Smith Ramadge Ramadge in the rent-charge (whether under the appointment or in default of appointment) was disposed of by his will or was left undisposed of, John Arthur Cooper Ormsby, his personal representative, was, by leave of the Court, added as a defendant, and the summons was amended by adding the fourth question above mentioned.

*Meade*, for the plaintiffs.

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Feb. 12, 13, 14.

*Jellett K.C.*, and *O. Murphy*, for the daughters of Smith Ramadge the third:—

The appointment of the rent-charge to the daughters of Smith Ramadge the third, subject to the life interests of Henry George Ramadge and John Godwin Ramadge, was a valid appointment. The effective settlement was the deed of 1868, at which date all the appointees were in being; the deed of 1855 had no operation. Even if the deed of 1855 be taken as the effective settlement, the appointment was good, for its effect is the same as if successive

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life estates had been appointed to Henry George Ramadge, John Godwin Ramadge, and the daughters; the daughters had vested life estates in remainder. The ultimate appointment to Smith Ramadge Ramadge, "to the intent that the said annuity may merge and be extinguished in the inheritance of the lands charged therewith," is bad, for at the time of its taking effect he was tenant for life of the lands with remainder to his sons in tail, and the effect would be to benefit persons who were not objects of the power: *Routledge* v. *Dorril* (1), *Rucker* v. *Scholefield* (2). In any event, if the appointment to the daughters is void, the appointment to Smith Ramadge Ramadge, which is dependent on it, is also void: *Monypenny* v. *Dering* (3). The proviso giving the owner of the lands power to redeem the annuity by the payment of £4000 to the trustees is void: *Tyrrell's Estate* (4).

*H. Wilson K.C.*, and *H. Cole Bowen*, for Wilhelmina F. R. Ramadge:—

The deed of 1855, to which Smith Ramadge the third was a party, is the dominating document; the trusts of the term contained in it must be read into the deed of 1868. The appointment to the daughters of Smith Ramadge the third is bad, notwithstanding that the intended effect might have been validly carried out: *Whitby* v. *von Luedecke* (5); *Manning's Trusts* (6). The limitation to Smith Ramadge Ramadge is also bad as following, and being dependent upon, a void limitation: *Monypenny* v. *Dering* (3); *In re Thatcher's Trusts* (7); *In re Hewett's Settlement*, *Hewett* v. *Eldridge* (8); *Routledge* v. *Dorril* (1). They also referred to *In re Hargreaves* (9); *Bright* v. *Harcourt* (10); *Ashforth* v. *Ashforth* (11); *Arnold* v. *Arnold* (12); *MacDonald* v. *MacDonald* (13).

(1) 2 Ves. 356.
(2) 1 H. & M. 36.
(3) 2 De G. M. G. 145.
(4) [1907] 1 I. R. 194, 292.
(5) [1906] 1 Ch. 783.
(6) 49 I. L. T. R. 143.
(7) 26 Beav. 365.
(8) [1915] 1 Ch. 810.
(9) 43 Ch. D. 401.
(10) 19 Ch. D. 300.
(11) [1905] 1 Ch. 535.
(12) 2 My. & K. 365.
(13) 2 Sc. & Div. App. 492.

*Leech K.C.*, and *J. E. Walsh*, for Henry George Ramadge:—

The rent charge arises under the deed of 1855, which created a perpetual charge on the fee; the deed of 1868 did not create it, but merely set up the deed of 1855: *Beaumont* v. *Salisbury* (1); *Barratt* v. *Wyatt* (2). The annuity is a perpetual annuity; the term is only an additional security. The appointment to the daughters of Smith Ramadge the third is void, but the ultimate limitation to Smith Ramadge Ramadge is not dependent, and is valid: *In re Gage, Hill* v. *Gage* (3); *Whitby* v. *von Luedecke* (4); *Wainwright* v. *Miller* (5). The ultimate limitation is accordingly accelerated by the failure of the prior gift: Jarman, 6th ed., vol. i, 350-1; *In re Daveron, Bowen* v. *Churchill* (6); *Monypenny* v. *Dering* (7); In *Routledge* v. *Dorril* (8) and *In re Thatcher's Trusts* (9) the ultimate limitations were held to be dependent on prior void limitations; in *In re Hargreaves* (10) the power of appointment was invalid. The words "to the intent that the same may merge and be extinguished in the inheritance of the lands charged therewith" are surplusage, and may be discarded: Sugden, Powers, 8th ed., 526–7; *Churchill* v. *Churchill* (11). The interest of Smith Ramadge Ramadge in the annuity, which was real estate, was not disposed of by his will, and goes to my client, who is his heir-at-law.

*Macrory*, for John Arthur Cooper Ormsby, the personal representative of Smith Ramadge Ramadge:—

The annuity is personal estate; it arises only under the deed of 1868, which only created a term to support it. The deed of 1855 is to be read into the deed of 1868 only for the purpose of showing what were the trusts of the annuity: *Creagh's Estate* (12). The entire transaction is to be taken as of the date of the deed of 1868, when all the appointees were in being: *In re Marke Wood* (13). Even if the power is to be taken as

(1) 19 Beav. 198.
(2) 30 Beav. 442.
(3) [1898] 1 Ch. 498.
(4) [1906] 1 Ch. 783.
(5) [1897] 2 Ch. 355.
(6) [1893] 3 Ch. 421.
(7) 2 De G. M. G. 145, at p. 180.
(8) 2 Ves. 356.
(9) 26 Beav. 365.
(10) 26 Beav. 365.
(11) L. R. 5 Eq. 44.
(12) 25 L. R. Ir. 128.
(13) [1913] 2 Ch. 574.

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having been created by the deed of 1855, the ultimate limitation to Smith Ramadge Ramadge is not dependent on the prior gift to the daughter of Smith Ramadge the third: *Monypenny* v. *Dering* (1). *In re Thatcher's Trusts* (2) is distinguishable, for there the ultimate gift could only have taken effect by displacing prior absolute gifts, but here there is no displacement where the prior gifts are only of life estates. *In re Hewett's Settlement*, *Hewett* v. *Eldridge* (3) is similarly distinguishable.

*Chadwick*, for John P. C. Crosslé and Henry D. Joliffe, the trustees of Henry George Ramadge's marriage settlement:—

The proviso for the redemption of the annuity is void: *Tyrrell's Estate* (4); *Donoughmore's Estate* (5). As regards the limitation to Smith Ramadge Ramadge, to the intent that the annuity should merge in the inheritance of the lands, it is the state of affairs at the date of the will, and not at the testator's death, that must be considered; sect. 24 of the Wills Act, 1837, does not apply in the case of a special power of appointment: *Doyle* v. *Coyle* (6). An annuity can be merged in an estate tail without the entail having been barred: *Grice* v. *Shaw* (7).

*Cur. adv. vult.*

March 20.

O'CONNOR M.R. (having stated the facts, proceeded):—

These are all the facts which I think it is necessary to state for the determination of the legal questions involved in the matter.

The first of these questions is whether the appointments of the annuity of £200 made by the will of Smith Ramadge the third derive their force from the settlement of 1855 or from the deed of 1868. If the appointments were made under the former, they are open to challenge as violating the rule against perpetuities, because the appointees were not in existence in the year 1855, and contingent life estates which might not vest during the lives then in being or twenty-one years afterwards were appointed to some of them. On the other hand, if the appointments are to be referred to the

(1) 2 De G. M. G. 145.
(2) 26 Beav. 365.
(3) [1915] 1 Ch. 810.
(4) [1907] 1 I. R. 292.
(5) [1911] 1 I. R. 211.
(6) [1895] 1 I. R. 205.
(7) 10 Hare, 76.

deed of 1868, no such objection can be made, because all the appointees were in existence at that date.

It will be remembered that the deed of 1855 was inoperative owing to the fact that the settlor was only a tenant in tail, and the deed was not enrolled as a disentailing assurance. The deed of 1868 was executed for the purpose of setting up the limitations in the deed of 1855, in order that the intentions of the settlor in the latter should not be frustrated. Is then the deed of 1868 the effective settlement, or is it to be read as relating back to the deed of 1855? If the former, the appointments made by the will are to be read into the deed of 1868; if the latter, they are to be read into the deed of 1855. The terminus a quo for the time limit under the rule against perpetuities is to be fixed by deciding this question.

I must now go back to the deed of 1868. It limited a term of 1000 years to certain trustees, their executors, administrators, or assigns, to be computed from the 17th September, 1855 (the date of the original settlement), upon and for the trusts and with the powers in that settlement declared of and concerning the term of years thereby purported to be limited and in ratification and confirmation of the same term. It is to be noted, in the first place, that the term was to run from the date of the first settlement. This by itself is an indication of intention to set up the latter so as to make it operative just in the same way as it would have operated if valid. But this is not the only indication of such intention. There is positive proof of it in the words which follow:—"Upon and for the trusts and with the powers in the settlement of 1855 declared." I can only read this as meaning that the persons interested in the term and the annuity thereby secured, and the persons having powers over the said term and annuity, were to have the same equitable estates and powers as were granted by the settlement of 1855. In other words, the appointor, having the power, was to be entitled to exercise it so that it should have full effect in the same way as if the deed of 1855 was a valid instrument. Now, in exercising the power contained in this deed, the rule against perpetuities should be observed, having regard to the persons then in being. But if, in the exercise of the power, the appointor was

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to be entitled to disregard the conditions of time and persons as they stood in 1855, and to pay attention only to the conditions existing in 1868, it is obvious that the power would not be the same as the original power, but a wholly different one, which would enable limitations to be made which could not have been made under the deed of 1855. For this reason I am of opinion that the appointments of the annuity of £200, made by the will of Smith Ramadge the third, dated the 13th October, 1877, must be treated as appointments made under the settlement of 1855, and must for the purpose of deciding whether they are valid be read into that deed. No doubt the title to the interests appointed must depend on the deed of 1868, because before that date there was no legal term of years in existence; and if at any time prior to 1868 the lands had been incumbered by Smith Ramadge the third, the term would be subject to the incumbrances. But this would only be a matter of priority; and it is this consideration which distinguishes *In re Creagh's Estate* (1) from the present case. In that case a tenant for life and tenant in tail joined in a re-settlement, whereby the estate tail was barred, and the lands resettled on the tenant for life for the same estate with remainder to the former tenant in tail for life with remainders over. The resettlement gave power to the tenants for life to raise moneys on the settled estate for their own benefit, and also to charge the lands with such jointures for their respective wives, and such portions for their younger children, as in the original settlement provided for. The powers of raising moneys for their own benefit reserved by the settlors in the re-settlement were held to override the powers of jointuring and raising portions for younger children which were revived. The question was only one of priority, and not such as we have to deal with in the present case. Therefore, I do not think that *Creagh's Estate* (1) has any application; and in my opinion the validity of the execution of the power of appointing the annuity must be determined by treating the power as one contained in the deed of 1855. At this last-mentioned date the estates appointed should vest during the lives then in being or twenty-one years afterwards. Now, the appointments made were in the first place to the two younger sons of the marriage, viz.,

(1) 25 L. R. Ir. 128.

Henry George Ramadge the younger and John Godwin Ramadge, in equal shares during their respective lives. So far, the appointments are not disputed, and obviously they could not be disputed. The next limitation was that upon the death of one or both of the appointor's two younger sons a portion or the whole, as the case might be, of the said annuity should go and be divided in equal shares between such of his three daughters, Helen, Rose, and Catherine, as should be then living for their joint lives and the survivor of them during her life. This appointment is challenged, because the estates appointed might not vest during the lives in being in 1855 or twenty-one years after their cesser. The appointment was only to such of the daughters as might survive their brothers, Henry George and John Godwin. This gave only contingent estates, and the persons entitled on the happening of the contingency might not be ascertainable during the prescribed period. The case seems to me to be covered by *Whitby* v. *Von Luedecke* (1). There by a marriage settlement real estate was settled on the wife for life, and after her death on the children or issue of the marriage as the wife should by will appoint. There were only two children of the marriage—daughters. The wife appointed that the estate should be equally divided between the two daughters during their respective lives, and in the event of the death of either the survivor should receive the income, and after the death of the survivor that the property should be sold and the proceeds divided between the children of the daughters. It was held by Buckley J. that the appointment to the survivor was bad, because it gave a contingent interest which might not become a vested estate within a life in being at the date of the settlement or twenty-one years afterwards.

The fact that the contingent estate might be alienated does not affect the question as decided in *In re Hargreaves*, *Midgley* v. *Tatley* (2). It was contended that as the contingent estates which were appointed were only life estates, the case is an exception to the general rule. As against this, there is the authority of *In re Thatcher's Trusts* (3). There there was a bequest to Elizabeth Hobbs for life, afterwards to her children equally, to be vested in such as should attain the age of twenty-five years, with a gift over

(1) [1906] 1 Ch. 783. (2) 43 Ch. Div. 401. (3) 26 Beav. 365.

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if no child should attain twenty-five, as to one moiety to William Hobbs for life, and as to the other moiety to Anne Tuckwell for life with remainder to her children. The gift over to Anne Tuckwell for life is the point of the case. Romilly M.R. said :— "There arises the question whether the gift over to Mrs. Tuckwell for life is good, this being a limitation to a person in existence at the date of the will." Then, after deciding that upon the construction of the will the gift to Mrs. Tuckwell was expectant on the failure of the limitations to the children, which were too remote, he held that the gift was void. No doubt, there has been a difference of opinion among text-writers as to the soundness of this decision; but it has never been overruled, as pointed out by Astbury J. in *In re Hewett's Settlement*, *Hewett* v. *Eldridge* (1). It seems to me to apply a fortiori to the present case, because the daughters of Smith Ramadge Ramadge were not in being in the year 1855.

I therefore hold that the appointment of the annuity to the daughters was invalid, and that to the extent of the estates appointed to them the annuity went as in default of appointment.

The next limitation in the appointment of the annuity was that after the death of the survivor of all the testator's younger children the whole of the annuity should go to his eldest son, Smith Ramadge Ramadge, to the intent that the same should merge and be extinguished in the inheritance of the lands charged therewith. This appointment is impeached on two grounds. The first is that it is dependent upon a prior appointment, which is invalid as too remote, and for this reason must fail. It was not contended that this would not be the result if the subsequent appointment were dependent upon the prior one. The law is too firmly established to admit of any such contention; but it was argued that the final appointment to Smith Ramadge Ramadge was an alternative and independent appointment. This is entirely a question of construction, and it appears to me that the words introducing the limitation to Smith Ramadge Ramadge, viz., "and after the death of the survivor of all my younger children," too plainly marks it a limitation expectant and

(1) [1915] 1 Ch. 810, 817, 822.

dependent upon the prior limitation to leave open the construction that it was an alternative limitation. For this reason alone I hold that the appointment to Smith Ramadge Ramadge was void, and that the annuity went in default of appointment, subject to the appointments made in favour of Henry George Ramadge and John Godwin Ramadge.

If it were necessary I should be prepared to hold that the appointment to Smith Ramadge Ramadge was void for another reason. The appointment was made to him "to the intent that the same annuity of £200 per annum may merge and be extinguished in the inheritance of the lands charged therewith." Now, this appointment could not take effect till the testator's death, and at that date the lands were in settlement on Smith Ramadge Ramadge for life, with remainder to his sons in tail, so that the annuity would be limited for the benefit of persons not objects of the power. It was argued that the words "to the intent," &c., should be treated as surplusage and not part and parcel of the appointment, but I cannot agree in that view. I do not know of any words more apt for incorporating in a gift something that is to affect its user and destination than the words "to the intent," which are equivalent to "in trust for" or "to the use of." The annuity, therefore, went as in default of appointment among all the children of Smith Ramadge the third in equal shares.

But then the question arises whether Smith Ramadge Ramadge disposed of his share of the annuity by his will. It is dated the 5th November, 1892, the day of the testator's death. It was evidently made without professional assistance, and hurriedly. The language is loose and inartistic. The will is as follows:—"I wish to leave my wife Florence Ethel £2000 less £150 which I wish Walter Harman to get. Should she Ethel Ramadge marry again, the £2000 is to go to my brother John Godwin Ramadge, and all my silver to my wife Florence Ethel Ramadge unless she marries again, when it is to be divided between Henry George Ramadge and John Godwin Ramadge, or at her death. The dinner and dessert service and linen to my wife and all properties after her death or if she marries again to go to my brother John Godwin Ramadge. I wish my executors

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to be John Godwin Ramadge and John Arthur Cooper Orsmsby."

There is no reference to the annuity in the will, but it is argued that the words "all properties" are sufficiently wide to cover the annuity or any share therein. "Property" is wide enough to carry everything, but the question is—Did the testator use it in this wide sense, or was he only referring to the special properties mentioned in the will? I think that the latter construction is the proper one. The properties were to go after his wife's death, so that he must have meant the properties the use of which he had given to his wife. I therefore hold that Smith Ramadge Ramadge died intestate as to his share in the annuity.

But yet another question arises:—Is the annuity personal or real estate? The deed of 1855 purported to grant a perpetual annuity to the trustees, their heirs and assigns, and to demise a term of 1000 years to secure the annuity. The annuity was charged directly on the fee of the lands. The term was only subsidiary. But the deed was inoperative, and in order to set up the annuity and the trusts declared in respect of it Smith Ramadge the third, by the deed of 1868, demised the lands for the term of 1000 years upon the trusts of the deed of 1855. These trusts were to secure the annuity of £200 which, if the deed of 1855 were operative, would have been a perpetual annuity. But a perpetual annuity cannot issue out of a term of years, however long, nor can a chattel interest support a freehold estate. There is no annuity in existence except that legally created for the first time in 1868, and that is for 1000 years and is personal estate. No doubt it was the intention of the deed of 1868 to set up to all intents and purposes the settlement of 1855, and it was argued that because the settlement of 1855 purported to grant a freehold annuity, the object of the deed of 1868 would to some extent be frustrated if it did not give an annuity of the same quality. This consideration cannot alter the legal effect of a conveyance, and from a practical point of view is of little moment, because there is no substance in the distinction between an annuity for ever and one for 1000 years. One is as good as the other. The fact that one goes to the heir-at-law and the other to the executors, does not affect the value.

The only other question which remains for decision is, whether the clause in the settlement of 1855 providing for the redemption of the annuity is valid. In my opinion it is settled by the decision in *Tyrrell's Estate* (1) that the redemption clause is invalid.

Solicitors for the plaintiffs and for the defendant Henry George Ramadge: *Crookshank, Leech, & Davies.*

Solicitors for the defendants Helen Louise Thompson, Rose Elizabeth Ramadge, and Catherine Mary Joliffe: *Moore, Keily, & Lloyd.*

Solicitors for the defendant Wilhelmina F. R. Ramadge: *Martley & Barlee.*

Solicitors for the defendant J. A. C. Ormsby: *Martley & Barlee.*

Solicitors for the defendants J. P. C. Crosslé and H. D. Joliffe: *Longfield, Kelly, & Armstrong.*

A. H. W.

(1) [1907] 1 I. R. 292.

*H. L.*
1919.
Feb. 21, 24.

## WESTROPP *v.* CONGESTED DISTRICTS BOARD.

*Profit a prendre—Turbary—Reservation—Perpetuity—Vesting Order—Superior interest.*

There cannot be a grant of a profit a prendre without a capable grantee. A series of residents in a house are not capable grantees.

APPEAL from the judgment of the Court of Appeal (1).

Counsel for the appellants: *Hon. Frank Russell K.C.* and *F. MacMullan* (both of the English Bar).

Counsel for the respondents: *Samuel L. Brown K.C., T. S. M'Cann K.C.*, and *R. G. L. Leonard K.C.* (all of the Irish Bar).

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THE HOUSE OF LORDS (Lord Birkenhead C. and Lords Atkinson, Shaw of Dunfermline, and Wrenbury) affirmed the judgment of the Court of Appeal with costs.

The respondents were not called on.

Solicitors for the appellant: *Frere, Cholmeley, & Co.*, agents for *Maunsell, Darley, and Orpen.*

Solicitor for the respondents: *H. Z. Deane*, agent for *John O'Connor.*

(1) [1918] 1 I. R. 265, 272.

## MOORHEAD *v.* KIRKWOOD.

*M. R.*
1918.
Dec. 18.

*Order for sale of land—Appointment of person to convey—Practice—Trustee Act*, 1893 (56 & 57 *Vict. c.* 33), *sect.* 33.

Where the Court orders a sale of land, and a person entitled, being a party to the proceedings, refuses to execute the deed, the person having carriage of the proceedings, and not the purchaser, is the proper person to take out a summons to have a person appointed to convey under sect. 33 of the Trustee Act, 1893.

SUMMONS.

In a partition suit the lands in question were ordered to be sold. Miss Kathleen Kirkwood, one of the defendants, a person entitled to an interest in the lands, refused to execute the conveyance to the purchaser, who thereupon took out a summons to have a person appointed to convey to him the lands sold for all the estate and interest of the said defendant therein.

*Leet*, for the purchaser:—

This application is properly made by the purchaser, who is "a person beneficially interested in the land" (Trustee Act, 1893, sect. 36, sub-s. 1). In *Ayles* v. *Cox* (1) a vesting order was made on the application of the purchaser where the owner of the property sold under the order of the Court was an infant. That was an application under the Trustee Act, 1850 (13 & 14 Vict. c. 50); sect. 36 of the Trustee Act, 1893, reproduces sect. 37 of that Act. It is stated in Daniell's Chancery Practice (8th ed., p. 961) that such an application may be made by the purchaser. [He also referred to *Beale* v. *Bragg* (2).]

*Russell*, for the plaintiff.

(1) 17 Beav. 584. (2) [1902] 1 I. R. 99.

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O'CONNOR M.R.:—

In the circumstances I shall make the order sought, but I entirely dissent from the view that it is the practice in this country for an application of this kind to be made by a purchaser. It is the business of the solicitor having the carriage of the sale to make title to the lands ordered to be sold, and he is the proper person to take out a summons in such a case as the present.

Solicitors for the purchasers: *A. & L. Goodbody.*
Solicitor for the plaintiff: *W. V. Seddall.*

A. H. W.

## CATHERINE COOKE *v.* GEORGE COOKE AND JOSEPH COOKE (1).

(1917. No. 755.)

*Appeal.*
1918.
Nov. 11, 12, 14, 15, 18.

*Practice—Committal—Attachment—Requisites of affidavit for.*

An application for the issue of a writ of attachment is technically different from an application for a committal order, and the provisions of Order 52, rule 4, which require that every notice of motion for an attachment must state in general terms the grounds of the application, do not apply to a motion to commit.

The distinction between attachment and committal considered.

*Taylor, Plinston Brothers, & Co., Ltd.* v. *Plinston* ([1911] 2 Ch. 605) followed.

Thomas Cooke, who owned a farm in county Louth comprising 13 acres, died on the 10th April, 1903, having by his will devised and bequeathed all his real and personal estate to his wife, the plaintiff in this action. The widow continued to reside on the farm with her children, including the defendants George Cooke and Joseph Cooke, and they together carried on a considerable business in cattle-dealing and farming generally, and took additional lands for the agistment of cattle, the contracts being in many cases in the names of George, or of others of the sons. Subsequently disputes arose between the members of the family, and in 1915 the plaintiff brought ejectment proceedings against George Cooke, and he ceased to reside on the farm. The present action was, on the 25th August, 1917, instituted by the plaintiff against her two sons, seeking (inter alia) a declaration that the lands were her property, and that during the years 1915-16-17 the defendants were acting as her agents in the buying and selling of cattle, &c.; an inquiry as to damages, and an injunction restraining the defendants from interfering with the lands or stock. No defence was filed by Joseph Cooke, but George Cooke by his defence claimed the benefit of all grazing and agistment contracts entered into by him for himself, and he counter-claimed for property alleged to have been wrongfully retained by the plaintiff.

(1) Before SIR J. CAMPBELL C., RONAN and O'CONNOR L.JJ.

*Appeal.* 1918. COOKE v. COOKE.

The action came on for trial before Ross J. on the 18th June, 1918, when it stood adjourned, pending settlement, to the 20th June, on which day the defendant George Cooke having refused to sign the proposed consent settling the action, Ross J. made an order that the action should be listed for trial on the 24th June, and "that the defendant George Cooke and his servants and agents be and they are hereby restrained until further order of this Court from interfering with the farm of Upper Merches, Dundalk, in the county of Louth, in the statement of claim mentioned, or the stock, cattle, or other chattels or property thereon." On the 24th June, 1918, during the hearing of the action, the following notice was served upon the defendant George Cooke:—"Take notice that on this day, the 24th June, 1918, at the rising of the Court, an application on behalf of the plaintiff will be made to the Court for an order that the defendant George Cooke be committed to prison for breach of the injunction granted against him on the 20th June, 1918, and which was duly served upon said defendant George Cooke, which application will be grounded upon the said injunction order, the affidavit of service thereof, the affidavit of Joseph Cooke filed the 20th June, 1918, the oral evidence of the plaintiff and Joseph Cooke to be given on said application, the several documents already filed, the nature of the case, and the reasons to be offered. Dated 24th June, 1918."

On the hearing of the said application on the 24th June oral evidence was given by the plaintiff that a quantity of cattle had been removed from her farm by the defendant George Cooke; this, however, was denied by the latter, and in the result Ross J. directed a writ of attachment to issue against George Cooke with a stay upon the order to enable him to return the cattle. The cattle were returned to the plaintiff's farm on the 25th June. The hearing of the action was continued on the 27th June, on which day Ross J. made a decree which in substance declared the plaintiff entitled to the farm and stock in question, and restrained the defendant George Cooke from trespassing upon the plaintiff's lands, and from removing stock, crops, or chattels therefrom, and the plaintiff was thereby awarded £700 damages against George Cooke by reason of his wrongful acts in trespassing upon the plaintiff's lands, and removing and converting to his own use her cattle, stock, crops, and other goods and chattels.

On the 25th July, 1918, a notice of motion was served personally upon the defendant George Cooke, giving notice that on the 30th July, 1918, an application would be made to Ross J., "for an order that the stay upon the order of attachment of the defendant George Cooke, dated 24th June, 1918, be removed, and the writ of attachment against the said George Cooke do forthwith issue." Copies of affidavits were served therewith alleging that George Cooke had removed more cattle from the lands of the plaintiff. The notice and affidavits were not served on Mr. Hamill, the solicitor acting on behalf of George Cooke, until the 27th July. An affidavit subsequently filed by Mr. Hamill, and not controverted, averred as follows:—"The time given me to prepare for the application of the 30th July was wholly inadequate. I prepared the affidavit as quickly as I possibly could, and went up specially to Dublin on the hearing of the application. Both the senior and junior counsel employed in the case were out of Dublin, and I had to give the brief to a counsel who knew nothing about the case. As soon as I handed out the brief, my counsel went down to Court, and found that the case was at hearing, and that some of the affidavits had been read. My counsel then informed the Judge that he had just been instructed that moment to appear for George Cooke, that he had not been in the case before, that the counsel in the case were both out of town, and that he wished to get an adjournment for a day so that he might have an opportunity of reading his brief and preparing the case. The Judge refused this application. My counsel then asked for an adjournment till a later hour in the day so that he might have an opportunity of reading his brief. The Judge refused this application also." It is sufficient for the purposes of this report to state that the affidavits filed by the plaintiff in support of the application alleged that George Cooke had again entered upon the plaintiff's lands and removed cattle therefrom, and that George Cooke denied these charges in toto.

By his order of the 30th July, 1918, Ross J. directed "that a writ of attachment do issue against the said defendant, George Cooke, for his contempt in disobeying said order, dated the 20th day of June, 1918, and said judgment, dated the 27th day of June, 1918, by trespassing upon the plaintiff's lands at Upper

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Merches, in said order and judgment mentioned, and removing cattle and other stock, the property of the plaintiff, from said lands; and this Court doth order that the said defendant be committed to prison under said writ of attachment for a period of six months from the date of his arrest, unless his release shall be previously ordered," &c. In pursuance of this order, George Cooke was arrested on the 23rd August, 1918, and conveyed to Mountjoy Prison, where he remained confined. On the 20th August, 1918, George Cooke lodged an appeal against the order of the 30th July, 1918; and on the 5th September, 1918, he applied by motion on notice to Moore J., sitting as Vacation Judge, to discharge the said order of the 30th July, and to set aside the writ of attachment issued in pursuance thereof on the ground of irregularity. Moore J., having refused this application on the ground that an appeal against the order of the 30th July was pending, George Cooke, on the 23rd September, 1916, lodged a further appeal against the order of Moore J. These appeals now come on for hearing.

*J. MacLoone K.C.* and *Bartley*, for the appellant:—

We submit that on the evidence before the Court an order for committal should not have been made, and that the refusal to adjourn the hearing of the application on the 30th July amounted to a denial of justice to the appellant.

The entire proceedings under which the appellant was attached were invalidated by irregularity. Ross J. has confounded attachment and committal. The application on the 24th June, 1918, was one for committal for breach of the former injunction, but Ross J. directed a writ of attachment to issue, with a stay upon it, a remedy not applied for, there having been no amendment of the notice. The subsequent application on the 30th July, 1918, was one to remove the stay, and the order of that date, without formally removing the stay, directed the issue of a writ of attachment, and that the defendant should be committed to prison under such writ. Although the only application was to remove the stay, this order was made upon evidence of acts alleged to have been committed subsequent to the order of the 24th June. Neither notice complied with the rules of Court, as

every notice of motion for an attachment must state in general terms the grounds of the application Order 52, rule 4. Further, sufficient notice of the application of the 30th July was not given under Order 44, rule 2. If leave to serve short notice was given, which does not appear, this should be set out on the face of the notice of motion. Notice of appeal had been issued prior to the execution of the writ.

*Serjeant Matheson K.C.* and *James Geoghegan*, for the respondent:—

We contend that on the merits the order was rightly made. No point was made in the Court below as to any of the alleged irregularities, the case was tried out on the merits, and the appellant ought not now to be allowed to raise any technical objection. In any event the result would have been the same. If there was non-compliance with any rule, the order was not thereby invalidated, and it should not now be discharged, as no injustice was done. Order 89, rule 1.

[The following cases were cited and discussed:—*Callow* v. *Young* (1); *Piper* v. *Piper* (2); *Taylor, Plinston Bros., & Co., Ltd.* v. *Plinston* (3); *Litchfield* v. *Jones* (4); *Taylor* v. *Roe* (5); *Rendell* v. *Grundy* (6); *Petty* v. *Daniel* (7); *Dawson* v. *Beeson* (8).]

SIR JAMES CAMPBELL C.:—

A man named Thomas Cooke was the owner of a small farm of 14 acres statute, situate near Dundalk, Co. Louth. He died in April, 1903, and under the terms of his will his widow, Catherine Cooke, was left his entire property. There were a number of children by the marriage, of whom the following are referred to in these proceedings:—George, Joseph, John, and Catherine; that is to say, three sons and one daughter. The family continued to live together on the farm, and, under the management of the widow, a thrifty and industrious woman, who apparently was faithful to her trust. With the assistance of her children, she carried on a considerable business in cattle-dealing

(1) 56 L. J. 147.
(2) [1876] W. N. 202.
(3) [1911] 2 Ch. 605.
(4) 25 Ch. D. 64.
(5) 68 L. T. 213.
(6) [1895] 1 Q. B. 16.
(7) 34 Ch. D. 172.
(8) 22 Ch. D. 504.

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and farming operations generally. Most unfortunately friction arose, and in the disputes which followed Joseph is alleged to have sided with his mother, while the other three children appear to have joined the opposite camp. Finally, in 1915, the widow took ejectment proceedings against her son George, as the result of which he ceased to reside upon the farm. It had been their habit to take various plots of land by agistment for cattle, the contracts being, in many cases, made in the name of George or others of the sons; and even after the ejectment proceedings this practice was continued, the sons taking an active part in the cattle business, attending fairs and markets, and selling cattle. It is notorious that in many such cases the adult sons deal, or believe themselves to be dealing, in this way for their own benefit, to some extent at least, and the business is carried on under a rough method of co-partnership; but Mr. Justice Ross has decided that in this particular case they were all acting as the agents of their mother, and that she alone was entitled to the stock and profits. As his decision upon this point is the subject-matter of an appeal still pending in this Court, I shall not refer to it further, but shall, for the purpose of my judgment, assume it to be correct.

The friction having become acute, the widow, on the 25th August, 1917, issued a writ in the Chancery Division against her sons George and Joseph, praying for a declaration, inter alia, that the farm was hers, that during 1915, 1916, and 1917 the defendants were acting as her agents in the taking of these agistments, and in the buying and selling of cattle, &c., for an inquiry as to damages, and for an injunction restraining the defendants from interfering with the land or stock. The action came on for trial before Mr. Justice Ross on the 18th June, when it was apparently stated to be in course of settlement, and it accordingly stood adjourned until the 20th June. The consent, which appears in the interval to have been signed by the defendant George's solicitor, was repudiated by George himself, and Mr. Justice Ross, upon being informed of these facts on the 20th June, made an order fixing the action for trial on the Monday following—the 24th June—and restraining the defendant George until further order from interfering with the lands, cattle, or other property. Upon the 24th June, at the hearing of the

action, an application was made on plaintiff's behalf for an order of committal against George for disobedience to this injunction, and a writ of attachment was directed to issue, with a stay upon it to enable George to return sixteen cattle which he was alleged to have removed, and which he agreed to return.

The action was not disposed of until the 27th June, when Mr. Justice Ross made a decree the substance of which declared the plaintiff entitled to the farm and stock, as well as to the benefit from the agistments and other dealings, and fixing the damages, dispensing with inquiry in Chambers, at £700. The size of this award, in reference to a farm of 14 acres, establishes the scale on which the cattle-dealing was carried on, and the profits received from it, and makes it all the more to be regretted that this industrious family should be engaged in "killing the goose" with all this costly litigation.

No further step in the action—and this is important—appears to have been taken until the 25th July, when a notice of motion was served for the following Tuesday, the 30th July, 1918, applying to have the stay removed from the attachment order of the 24th June, and for an order that the writ of attachment should forthwith issue. Upon the hearing of this motion, in circumstances of an unusual character, to which I must fully refer later on, Mr. Justice Ross made an order committing the defendant George to prison for a period of six months. This writ of attachment was taken out on the 3rd August, but not delivered to the sheriff until the 12th August, nor executed until the 23rd August, when George was conveyed to Mountjoy Prison, where he has remained from that day to the present. In substance it is this order which is the subject of the present appeal before us. It has been challenged upon several technical grounds as to the form and contents of the several notices and orders; and it has also been assailed upon the merits, upon the substantial grounds that it was made, first, without giving the defendant any reasonable opportunity for his defence, and, second, without proper or sufficient evidence.

Before I deal with these different contentions it is important to see in what respects, as appear from the affidavits filed in support of this motion of July 25, the injunction of June 20th

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was alleged to have been infringed. Two distinct breaches, and two only, are complained of—first, that on the night of the 27th June, the same sixteen cattle were again removed from the plaintiff's lands to lands in the occupation of the defendant George, and though twelve or at least ten of these animals were restored on the following day, June 28th, four were retained and sold by George for his own benefit; and second, that in or about the same time he also took out of the custody of Joseph and retained ten other cattle which both plaintiff and Joseph expressly swear were also the property of the mother. Serjeant Matheson has stated that the claim in respect of the ten cattle was unsustainable, inasmuch as their value was included in the damages awarded by the decree of June 27, that he abandoned it upon the hearing of the motion of July 25th, and explained to the Court that it had been inserted by the plaintiff under a mistaken impression as to her rights under the decree. While I entirely accept this explanation of what was perhaps not an unnatural impression for a woman unacquainted with the technicalities of the decree, I refer to the assertion of this unfounded claim in affidavits sworn some weeks subsequent to the event, presumably with the assistance of the plaintiff's solicitor, and after ample time and opportunity were afforded for their preparation, as an illustration of the unguarded way in which affidavits in such cases are often prepared, and the consequent necessity for submitting them to a most careful scrutiny. In the result, the whole case in support of the motion of July 25 rested upon the charge in relation to four out of the sixteen cattle, and the sole and only question for decision upon this motion was whether the affidavits established the truth of this charge as against the defendant George. I lay special stress upon this, inasmuch as it makes it very difficult to explain why, upon facts which were known to the plaintiff on June 28th, or at latest on July the 11th, she should have delayed the institution of the motion for weeks, or why, after this delay, the motion should have been rushed with lightning speed upon the very eve of the Long Vacation, when, to the knowledge at least of the plaintiff's advisers, the defendant would, in any event, if the writ of attachment was ordered to issue, and was executed, be detained in prison throughout the Long Vacation. I cannot accept

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the suggestion that it was essential to have the motion disposed of by Ross J., who, owing to circuit duties, was not available until the end of July, inasmuch as it was open to the plaintiff to have made this motion before the Master of the Rolls or Mr. Justice Wylie, who sat during the absence of the Judges of Assize, upon the earliest date after June 28th. The facts lay within a narrow compass, and the net question for decision was whether the defendant George was responsible for the failure to return the four specific animals. Nor can I appreciate the suggestion of Serjeant Matheson that this subject-matter of complaint was a continuing injury or trespass. The wrong, if it ever was committed, was complete and finished on June 28, and was no more continuing in the legal sense than in the ordinary case of a money debt where the injury continues until the debt is paid.

It cannot be denied, nor indeed has it been questioned before us, that while this jurisdiction of attachment is a most salutary, and in many cases the only effective, method for securing obedience to the orders of a Court, it is at the same time, having regard to its punitive consequences, a jurisdiction to be exercised with scrupulous care and caution upon convincing evidence, and only after the fullest and fairest opportunity has been given to the person sought to be attached of making his defence. I am reluctantly forced to the conclusion that each and all of these elements were conspicuously absent from the adjudication in this case. What are the facts, first as to the opportunity for the defence? I take them from the affidavit of the appellant's solicitor, which has not been contradicted, and which Mr. Serjeant Matheson frankly admits to be a true narrative of what took place. The notice of motion for attachment was issued on July 25th, and personally served upon the appellant that same evening. Service upon his solicitor was effected through the notice office on the following day, Friday, reaching his office in due course upon the next day, Saturday. Mr. Hamill appears to have made the best use of the short interval at his disposal, and prepared several affidavits which were sworn upon the Monday following—one being by his client, the defendant and appellant. Armed with these documents, Mr. Hamill came to Dublin from Dundalk early on the Tuesday morning to find that the senior and junior counsel

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who had been briefed for his client throughout, Mr. Henry K.C., and Mr. Lardner, were absent from Dublin, and he accordingly was compelled to hand the brief to Mr. Bartley, a junior counsel who, up to that moment, was a complete stranger to all the antecedent litigation. Counsel at once proceeded into Court in order to apply for a reasonable adjournment, but found that the motion was actually at hearing. He thereupon informed the Court of the above facts, and applied to have the motion adjourned for a week so as to enable him to acquaint himself with his brief; but this application was refused. He then appealed for a brief adjournment for an hour or two so that he might at least read his brief; but this application was likewise refused, and the case continued, with the result I have mentioned, counsel making the best fight for his client that was possible under such difficult conditions. I can well conceive of cases in which the proofs before the Court of the violation or disobedience of the order are convincing, or where delay was likely to result in grave injury to personal property, or where the injury complained of was continuous in the true sense and actually in operation at the time, so that any adjournment might be considered useless and prejudicial to the interests of justice; but such considerations have not even the most remote application to the facts of this present case.

Seeing that the plaintiff had taken no action for the recovery of these four cattle for several weeks, it is difficult to understand why it became a matter of such urgency that even one hour could not be granted to the defendant's counsel to prepare his case, more especially as by mere accident, and through no fault on his part, the defendant found himself deprived of the services of the two counsel who had previously defended his interests; and in my experience, extending over forty years, I have seldom, if ever, known a reasonable adjournment to be refused under such conditions. Neither of the counsel for the plaintiff, who were both present on the original hearing of this motion, has addressed a word to us in justification or explanation of the action of the Court in refusing Mr. Bartley's most reasonable application for a brief adjournment. Indeed, Serjeant Matheson has told us that neither he nor his colleague offered the least opposition to the application; and a counsel of his eminence must in a long and

distinguished career at the Bar have often claimed and received a similar indulgence from the Court. Audi alteram partem is a trite but venerable maxim, and in no case is it to be more generously applied than in proceedings which affect the liberty of the subject.

Mr. Bartley has also directly challenged the validity of this order of July 30th, upon the ground that even upon the materials that were before the Court on July the 30th, the order was improvidently made, and, speaking for myself, I would not upon such materials have made the order in question, at least without a further inquiry of a full and searching character. But the best foundation and justification for his complaint are to be found in the developments of this case on the appeal before us. [His Lordship, having dealt with the facts, proceeded.]

The order of July 30th has been challenged by counsel for the appellant upon another ground which is of more general importance, as it relates to the practice and procedure in reference to all motions of the kind. They contend that the proceedings in connexion with it were irregular from start to finish, and to appreciate this contention it is essential that I should shortly summarize them. The application made by the plaintiff to the Court on June 24th was for an order of committal of the defendant for breach of the previous injunction of June 20th, but Ross J. upon this application made no order of committal, but directed a writ of attachment to issue against him, with a stay upon it as already described. The notice of motion upon which the order under appeal was made asked that the stay should be taken off the order of June 24th, and the writ of attachment allowed to issue. Again the Court gave the plaintiff something other than and different from what she asked, and the order of July 30th upon this motion omits to remove the stay from the order of June, and directs a writ of attachment to issue, thereby plainly contemplating the issue of a fresh writ, as the order recites the decree of June 27th pronounced three days later than the original order of attachment. The irregularity relied upon is the act of the Court in granting a writ of attachment upon a notice of motion which in both cases, in the notice of the 24th June as well as in that of the 25th July, omitted to state the grounds on which the application would be based.

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Sir James Campbell C.

It has been said in *Callow* v. *Young* (1) that committal was the proper remedy where a prohibited act was done, while attachment was the proper remedy for neglecting to do some act ordered to be done. In practice, however, it is certain that both forms of redress have been treated as substantially the same, though it is equally certain that, ever since the passing of the Judicature Acts of England and Ireland, a distinction has been made in the rules of procedure applicable to each. Prior to the passing of the Judicature Act the writ of attachment was in many cases issued as a matter of course, but by Order 43, rule 2, of the earliest rules framed under that Act, it was provided that no writ of attachment should be issued without the leave of a Court or Judge, to be applied for on notice to the party against whom the attachment is to be issued. In Drummond and Smith's book on the practice of the Supreme Court, it is stated on p. 513 that this notice should specify the ground of the application; but all doubt on this point was settled, some years later, when a further rule which had already been adopted in England was framed for Ireland, and is to the following effect: "Every notice of motion to set aside, remit, or enforce an award, or for attachment, &c., shall state in general terms the grounds of the application," &c. (Order 52, rule 4). There is no similar provision in the case of notices of motion for orders of committal, and, consequently, the notice in the present case of the 24th June, though quite regular in form as a notice of motion for an order of committal, became irregular when Ross J. based upon it the orders for writs of attachment. The importance of this distinction which now exists in the procedure applicable to these different remedies has been emphasized by the Court of Appeal in England: see *Taylor, Plinston Brothers, & Co., Ltd.* v. *Plinston* (2), and must now be treated as essential in all similar applications in this country. The failure to observe it in the present case does not necessarily vitiate the order under appeal, as it does not operate to render the proceedings a nullity, but constitutes an irregularity only, thereby giving the Court a discretionary power to set aside the proceedings either in whole or in part, or to amend or otherwise deal with them as it shall think fit. We are agreed, however, that in the exercise of our discretion

(1) 56 L. T. 147.

(2) [1911] 2 Ch. 605.

upon the facts of this case the proceedings should be set aside, as it was essentially a motion of a character which called for notice of the grounds of complaint to the party attached. It has been urged that this precise point not having been raised in the Court below is not open to the appellant here, but we decline to yield to this argument, being satisfied that counsel for the defendant, had he been allowed a reasonable interval, would have raised it then just as he has done before us.

It only remains to dispose of the application before Moore J., sitting as vacation judge, to have the proceedings set aside as irregular. We are of opinion that this application was properly made, as the defendant was in prison under the order of July 30th, and the appeal against that order, though pending at the time, could not be disposed of until after the termination of the Long Vacation. Moore J. was wrong in holding, as both parties to this appeal agree he did, that he could not or ought not to interfere pending the determination of the appeal. We shall therefore discharge his order also. In setting aside the entire proceedings, we are conscious that we are doing so upon grounds for which the plaintiff is only indirectly responsible, and we, therefore, would have been anxious to save her from further litigation that might be consequent upon our order, but the appellant, through his counsel, has relieved us in this respect by his undertaking to take no proceedings of any kind arising out of the order appealed from or his arrest and imprisonment thereunder. This undertaking will be duly recorded, but the proceedings must be set aside, and the appellant must have his costs both here and in the Court below, including the costs of the application to Moore J. The appellant, however, must remember that he is bound to strict compliance with the injunction of June 27th, and that any failure upon his part to obey it will expose him to further proceedings which, if regular in themselves, may have serious consequences for him, and the parties to this unfortunate litigation would be well advised to effect at the earliest moment a reasonable compromise of their differences.

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RONAN, L.J.:—

Having regard to the opinions of the majority of the Court, my view is of no importance as to the result. I think, however, I should be wanting in respect to my colleagues if I did not indicate the grounds on which I venture to differ from them. As to the facts of the case I shall only refer to them in a general way, and shall not attempt a minute analysis of the affidavits, nor shall I deal with all the points raised. As to the law of the case I shall follow the usual course in this Court when we are differing from the Judge in the Court below, and state my views as briefly as I can in my own words.

There are two main questions in this case:—1, Does the form of the notice of motion in this case make the order under appeal irregular? or 2, Apart from this irregularity, should we now reverse on the merits, with all the facts before us, the order of Ross J.? The majority of the Court are of opinion that both these questions should be answered in the affirmative. I am of the same opinion as to No. 1. I have been unable to arrive at the same conclusion as to No. 2. I have the satisfaction of knowing that my opinion on both points is immaterial, as of course the judgment must be based on the view of the majority of the Court.

I shall first deal with the case on the assumption that my view of both questions is correct. What effect should be given to the irregularity in the order? It arose in my opinion from the fact that there was a general impression that since the Judicature Act and Rules there was no real distinction between attachment and committal. This is shown in a strong light by the decision of Malins V.-C., in *Piper* v. *Piper* (1). It is very short. I read the whole of it. "Nalder applied under Order 42, rules 5 and 20, for a writ of attachment against a defendant in contempt who did not appear. This notice of motion was for an order to commit. He contended that under Order 42, rules 5 and 20, the Court might order a writ of attachment on the notice of motion. The Vice-Chancellor held that on the principle that the greater includes the less, he had power to

(1) [1876] W. N. 202.

order the writ to issue, and he ordered accordingly." The defendant did not appear. The rules referred to provided that "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal." The rules were the rules of 1875. They are still the same in England and Ireland, Order 42 (rules 7 and 25). There was then no rule corresponding to Order 52, rule 4. See Irish Orders of 1877, Order 52. The Vice-Chancellor plainly thought that if he could make the more stringent order of committal there was nothing to prevent him from granting the attachment. The old distinction that committal is for "doing," and attachment for "not doing," is only abolished in cases of the enforcement of Orders, as in *D.* v. *A. & Co.* (1), where it was held that undertakings of solicitors, given by them, and embodied in an order of the Court, must be enforced by committal and not by attachment. Having regard to the case of *Piper* v. *Piper* (2), it is obvious how the general impression arose as to there being no distinction.

In this case the Lord Chancellor has clearly shown that Order 52, rule 4, has not been complied with. Why special provision should be made in case of attachment and not in the more stringent remedy of committal it is difficult to say. In *Taylor, Plinston Brothers, & Co., Ltd.* v. *Plinston* (3), the notice of motion was in the alternative—for committal or attachment. In that case the default in complying with Order 52, rule 4, was that copies of the affidavits had not been served with the notice of motion; but it is obvious that the provision as to stating in general terms the grounds of the application is equally mandatory. The omission was relied on as a preliminary objection to the motion. Warrington J. held that Order 52, rule 4, must extend to committal as well as to attachment, and that he could not proceed to make an order on either alternative. The Court of Appeal (4) held that the rule did not extend to committal, and remitted the case to him to proceed on this ground. It is very remarkable, as pointed out in the Court of Appeal, that the

(1) [1900] 1 Ch. 484.
(2) [1876] W. N. 202.
(3) [1911] 2 Ch. 368.
(4) [1911] 2 Ch. 605.

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Annual Practice for 1912 stated that the rule applied to committal. This is shown by the Master of the Rolls (at p. 608) to have arisen from a mistake in the head note to *Litchfield* v. *Jones* (1).

If the notice of the 25th of July had been a notice to commit, like that of the 24th of June, and an order to commit had been made, the proceeding would have been quite regular.

Mr. Bartley contended, on the authority of the judgment of Kekewich J. in *Taylor* v. *Roe* (2), that, whatever may have happened subsequently, the mere omission from the notice of the grounds on which it was based is fatal to the application for the attachment. The breach of Order 52, rule 4, in that case was omission to serve copies of affidavits on which the application for leave to issue a writ of attachment was founded—in my opinion a far more serious matter than the omission in the present case. *Taylor* v. *Roe* (2) was dealt with by the Court of Appeal in *Rendell* v. *Grundy* (3). Lord Esher M.R. said (at p. 21) :—"If Kekewich J. meant, in the case of *Taylor* v. *Roe* (2), to say that, whatever may have happened subsequently, the mere fact of failure to serve copies of the affidavits with the summons or notice of motion is necessarily and in all circumstances fatal to the application for an attachment—which I do not believe—I must say that I do not agree with him." In this case there are two things to be noted: first, that the objection was taken in the Court below and never withdrawn; and, secondly, that the defendant was not in custody. The Court of Appeal affirmed the order for the attachment.

The next case I would refer to is *Petty* v. *Daniel* (4), in which Kay J. reserved judgment. In this case the defendant had been in gaol for about a month under the order. He had not appeared on the motion for the attachment. The attachment was in respect of the breach of an injunction. The irregularity was that the affidavits had not been served with the notice of motion, but they were sent on the same day to defendant's country solicitor. The Judge held that Order 52, rule 4, had not been complied with. He said (p. 181):—"In proceedings for attachment the Court will look at the regularity of the proceedings more strictly,

(1) 25 Ch. D. 64.
(2) 68 L. T. 213.
(3) [1895] 1 Q. B. 16.
(4) 34 Ch. D. 172.

perhaps, than in any other, and will not allow advantage to be obtained by an irregularity. If any such irregularity is brought to its attention, the Court is not bound to proceed to attachment. Upon the whole, I am of opinion that the order of attachment is not void; but there has been an irregularity in obtaining it, and, therefore, under Order 70, rule 1, the Court may set it aside, or amend, or otherwise deal with it in such manner and upon such terms as the Court shall think fit. Acting under that power, I do not set aside the order." But in his discretion he released the defendant from prison.

Mr. Bartley cited the case of *Dawson* v. *Beeson* (1) in support of his argument in respect of one of the minor irregularities alleged, i.e., that it should appear on the face of the notice that leave to serve short notice had been obtained. The plaintiffs moved ex parte for an injunction, and for special leave to serve the defendant with notice of the injunction, but it did not appear that such short service of notice was specially asked for, nor did it appear on the notice of motion that leave for short service had been obtained. In that case the defendant did not appear on the motion. Jessel M.R., in delivering judgment in the Court of Appeal, (p. 509), held that the notice was bad, and proceeded—"It was intended to be a short notice, but it does not appear to have been expressly so stated to the Court. The party who relies on the notice is bound to show that it was distinctly stated. Therefore, I think that this order was irregularly obtained, and also that the service was irregular." So far the case is in favour of the defendant. But then comes the very important statement: "But the question then arises whether we ought to give effect to this objection. Nothing can be more distinct and valuable than the first rule of Order 59" (this is our present Order 89, rule 1), "which enables the Court to do justice without regard to technicalities. In the present case if the party served had appeared, the same injunction would have been granted. . . . In substance, he could not have resisted it. That being so, is he entitled to come now and have the order set aside merely because the service was irregular? He must, I think, be taken to have had notice that the Court has power to disregard

(1) 22 Ch. D. 504.

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irregularities and to decide on the material question." This shows that even where the party has not appeared on a defective notice and an irregular order has been obtained against him in his absence, the Court will not set aside the order on this ground if the merits are against him. The Court of Appeal then dealt with the case on the merits, and slightly modified the injunction. But the liberty of the defendant was not involved in this case. The irregularity there was in respect of a rule of practice, not a breach of one of the rules of Court.

As to the power of the Court to dispense with the conditions imposed by the rules of Court, I shall read the unanimous judgment of Palles C.B., and FitzGibbon and Barry L.JJ., in *Howard* v. *Howard*(1):—"But one other matter remains to be referred to, viz., Order 9, rule 13, which directs that 'in other actions for the recovery of land' (of which this is one), 'it shall be necessary to serve every person in the actual possession, or in receipt of the rents and profits, of the lands or any part thereof.' Mr. Atkinson argues that it may be that this rule ought not to have been made in such wide terms, and that it may be right that an amended rule should be made, limiting the persons to be served in cases of this description; but he insists that, until such amended rule shall have been made, the Court is bound hand and foot by the existing rule, and must act upon it, even if the result be to perpetrate an injustice. Having been myself a party to the framing of these rules, I am willing to admit that, if a case such as the present had been present to my mind, I should have suggested the prudence of adding to the rule in question the words 'unless the Court or a Judge shall otherwise direct.' The rule, however, as now framed, does not contain those words, and I admit that the appellant is entitled to any benefit which may accrue to him by their omission. The power of the Court, however, in reference to the matter in hand is, in my opinion, identically the same as if those words had been introduced. There was no statutory obligation upon the Court to make such a rule. By dispensing with it the Court does not violate any statute; and, in my opinion, where a dispensation with a rule of Court is not contrary to a statute, the Court has power to dispense with it in any case in which it may be of opinion

(1) 32 L. R. Ir., at p. 474.

that justice requires such dispensation. It is our common practice in the Exchequer Division to dispense, for what we deem sufficient reason, with strict compliance with a rule of practice not prescribed by statute. Such a power has, since the earliest times, been exercised by all the superior Courts."

The omission of a statement from the notice that the ground of the application was the defendant's entering and taking away the cattle, did not, in my opinion, in the least prejudice the defendant. He knew perfectly well that it was for his action in relation to the land and cattle that the plaintiff sought to have him sent to gaol. The defendant had copies of the affidavits, read them, and answered them. It is plain that he was in no way prejudiced in fact by the omission complained of.

In the present case the objection was not taken in the Court below. The general rule of this Court is against allowing such an objection to be relied on here, particularly where, if the point had been raised in the Court below, the defect could have been cured by amendment and adjournment or otherwise. Further, I think the general practice is that where a party contests a motion case on the merits and is defeated, it is then too late for him to object to the form of the notice of motion. These considerations would have great weight with me in ordinary circumstances, but in my opinion the affidavit of Mr. Hamill, which is admitted to be absolutely correct, entirely alters the matter.

The Lord Chancellor has stated the effect of that affidavit. In a case in which a defendant's liberty is involved he is prima facie entitled to the real and full advantage of the assistance of counsel. If this is not given, and an order is made for his imprisonment, the burden lies on the party obtaining the order to show that the proceedings were regular and the rules complied with.

In this case I have little doubt that if Mr. Bartley had a reasonable time for reading his brief and consulting Wylie's Judicature Acts and the Annual Practice the point would have been made, and that the fact it was not made should not preclude him from relying on it now. For these reasons I agree with the judgment of the majority of the Court as to the first question.

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[His Lordship then reviewed the facts of the case, and arrived at the conclusion that on the merits the order of Ross J. was rightly made.] In these circumstances, I think the proper course to take is to follow the order made by Kay J. in *Petty* v. *Daniel* (1), that is, to order the discharge of the prisoner.

O'CONNOR L.J.:—

I agree with the Lord Chancellor both as to the law and the facts.

An order was made in the present action, on the 24th June, 1918, in the presence of the defendant, and after hearing his oral testimony, and that of other witnesses. That order, as we are told, has not been taken out, or even made up. But from the Registrar's note, with which we have been furnished, it appears to be an order whereby the defendant George Cooke was attached for his disobedience to an interlocutory injunction granted against him on the 20th June, 1918, restraining him from trespassing on the plaintiff's lands, and from taking her cattle therefrom. The order, however, contained a proviso that the attachment should not issue if the cattle referred to in the order were put back. It is not denied that these cattle were put back on or about the 25th June, 1918, which probably accounts for the fact that the order was never bespoken or made up, and was looked upon by the plaintiff, for some time at any rate, as a dead letter.

The order under appeal is dated the 30th July, and is made pursuant to a notice of motion, dated the 26th July, 1918, in the following terms. [His Lordship read the notice of motion and continued.]

This application was based upon an allegation that on the night of the 27th June, or the morning of the 28th June, the defendant George Cooke removed some sixteen cattle, the property of the plaintiff, from the plaintiff's lands. What happened in connexion with the notice of the 26th July, 1918, is told in the affidavit of Mr. Hamill, solicitor for the defendant George Cooke. That affidavit is not contradicted, and indeed its substantial accuracy is admitted at the Bar. The notice of motion, with the affidavits grounding the same, was served on the defendant

(1) 34 Ch. D. 172.

personally, late in the evening of the 25th July. It was served on his solicitor, through the Notice Office, on the 27th July. The defendant swore his replying affidavit in Dundalk on the 29th July. The defendant's solicitor came up to Dublin to attend the hearing. His affidavit tells us, in paragraph 6, what took place at and prior to the hearing. [His Lordship read the paragraph.] In other words, the learned Judge seems to be of opinion that a motion on which he made a substantive order for attachment could be made ex parte.

I think it was most unfortunate that the learned Judge did not accede to the defendant's application for an adjournment; that application seems to me to have been most reasonable in the circumstances. The defendant and his solicitor obviously exercised diligence in their preparations to meet the motion; the circumstance of the absence of the defendant's usual counsel led to the brief being entrusted, at the last moment, to a counsel who was a stranger to the proceedings; the facts were complicated, as the time taken up by the hearing of this appeal shows; and it was altogether impossible for counsel for the defendant, without some short adjournment, to present his case, or make it intelligible. Furthermore it should not be left out of sight that the motion, though rushed at the last moment, was not launched till nearly four weeks after the happening of the events complained of. Had counsel been in a position properly to argue the case before Ross J., he would have been able, apart from many technical points argued before us, to have made out a very formidable case on the merits. Serjeant Matheson has frankly admitted that the sole reason why the motion was brought on and the sole subject of possible contention on the hearing of the motion was the taking away and non-return of the four cows, portion of the sixteen cattle, the property of the plaintiff. The defendant's affidavit stoutly denies that he took away any of the sixteen cattle at any time. But confining the controversy within its real limits, that is the four cows, the evidence stands thus: no admissible evidence was given in respect of them except by Joseph Cooke, who is or pretends to be friendly to the plaintiff; Joseph swears the defendant took them; on the other hand, the defendant charges Joseph himself with making away with them, and calls in his aid a man

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named MacCartney whose evidence, if it is believed, shows that it was Joseph took them, not George! Joseph's own testimony is tainted by two very damning circumstances—1, that two of the plaintiff's cattle, the subject of the disputes between the plaintiff and George, and with the abstraction of which George was at one time or another charged, are proved by a police sergeant to have been apparently secretly disposed of by Joseph, and 2, ten other cattle sworn by Joseph at one time to belong to his mother, were afterwards made the subject of an action by Joseph against George, from which action Joseph subsequently ran away. It is now admitted that these cattle were, at the time of Joseph's claim, and now are the property of George; and it is obvious that Joseph made and swore to a false case in respect of them. I am not sure if MacCartney's affidavit (which is all-important) was read or referred to before Ross J. If not, the learned Judge, owing to the way the case was rushed, had not before him one of the most important pieces of evidence in the case.

If all the facts had been presented to Mr. Justice Ross, as they should and would have been presented had his counsel had a reasonable opportunity of making up his brief, I am quite sure this order would not have been made. Certainly in my view of the evidence it ought not to have been made, and I therefore concur that it should be discharged.

I regard the case as of some consequence, for it involves the consideration of important questions concerning the procedure and proof on an application for attachment or committal.

The power to commit or attach is highly salutary and beneficial, for without it the administration of justice in many cases would be paralyzed. It is, likewise, a power of an extraordinarily drastic character, for it concerns that which our law holds most sacred, the liberty of the subject. Obviously, therefore, it should be exercised with great care and circumspection, and certainly not without giving the party impleaded the fullest possible opportunity, consistently with the interests of justice, of making his case. If, for that purpose, a reasonable adjournment be asked for, it should, in my opinion, be granted. What is a reasonable adjournment must, of course, depend on the circumstances of each case; good faith is of the essence of the application; the respective degrees of

diligence shown by the party asking for and the party resisting the adjournment, and the possibility of mischief should it be granted, are material elements in determining whether the application is reasonable or not.

The rules and, so far as I know, the cases are silent as to the nature and degree of proof necessary to carry an application for committal or attachment. Common sense seems to suggest that, having regard to the consequences of making the order asked for—the imprisonment of the party for a term that may be limited or not—the degree of proof should approximate to that which is required to ensure a conviction in an ordinary criminal case. In most cases there is no serious controversy of fact; the probabilities and evidence are either all the one way or so overwhelmingly the one way that no doubt arises. But in rare instances, of which the present is one, the facts upon the existence of which the grant or refusal of the application depends, are as stoutly affirmed on the one hand as they are denied on the other; and the issue is not cleared by the existence of circumstances that necessarily depress the scales against either of the contending sets of witnesses. In such a case, I, for one, would be loth to decide the controversy without seeing and hearing the witnesses. A robust affidavit may fail to resist the solvent of cross-examination, while, on the other hand, the tale lamely told in an ill-drafted one may gain vigour and strength from the recital of the facts and the demeanour of the deponent in the witness-box.,

Of course I do not forget that Ross J. had an opportunity of seeing the witnesses on a former occasion, and that then he concluded, in respect of the occurrences that were then in question, that George Cooke was not telling the truth. But the motion of the 30th July dealt with quite other matters, and "once a liar always a liar" is not a doctrine that applies to George Cooke or to any other man. Had the learned Judge given the adjournment asked for in this case, the consideration of how far we could interfere with a decision so peculiarly within his discretion would have arisen; certainly, if, after examining the witness, he had concluded that George was guilty of the contempt charged, his decision could not be questioned.

I think, however, that as the matter stands, having regard to

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the fact that the defendant was not given the opportunity to which, in my opinion, he was entitled of making his defence, we are free to consider the question as if it came before us in the first instance. Forming the best opinion I can from the meagre and defective materials before me, I think the case against George Cooke is not made out, and that, therefore, the order should be discharged.

Two technical points have been argued for the appellant. The first is that the notice of motion of the 24th June was for committal; but though no application for an amendment was made, the order is one for attachment—a process technically quite different. The second is that the notice of motion of the 26th of July is for a removal of the stay on the attachment granted by the order of the 24th June, whereas the order of the 30th July directs a writ of attachment to issue, not alone for disobedience to the interlocutory injunction of the 20th June (with which the order of the 25th June is concerned), but also for disobedience to the perpetual injunction of the 27th June. I am of opinion that both points are good; the procedure must be strictly regular; and these two orders are substantially different from the notices on which they are grounded; and for these reasons also I think the order should be discharged.

Solicitors for the appellant: *Ward & Hamill.*
Solicitor for the respondent: *T. P. Coffey.*

R. ST. J. C.

## BROWNE *v.* BROWNE.

*Powell J.*
1919.
Feb. 11, 18.
March 14.

*Practice — Administration — Secured creditor — Proof against personalty in Court after Order on further consideration.*

In an administration suit, there being an unallocated fund in Court, a secured creditor was allowed to prove against the general estate, subject to terms as to costs, although the time for making claims and moving to vary the chief clerk's certificate had long elapsed, and the Order on further consideration had been made some years previously.

Summons on the part of the Bank of Ireland that, notwithstanding that the time for applying to vary the chief clerk's certificate and making claims in the above action had expired, the applicants might be at liberty to make and establish their claim. The facts, as follows, are taken from the judgment of Powell J.:—

By deed, dated 4th February, 1895, Dominick Browne, the deceased, charged his lands with the sum of £400 in favour of the Bank of Ireland.

The chief clerk's certificate was filed on the 23rd of February, 1912, and the claim of the Bank of Ireland was not returned in the list of creditors thereby found. They did not prove as creditors against the deceased's estate, as it was supposed that the security afforded to them by the deed of charge was sufficient. There was now due to them £723 10*s.* 7*d.* It appeared from the affidavit of the assistant law agent of the bank that at the time of the filing of the chief clerk's certificate the estate on which the bank's mortgage was charged had not been sold, and that it was believed that the bank's charge was amply secured; that it was not until the 23rd May, 1913, that proceedings for the sale of the estate to the Congested Districts Board took place; that the lands were subject, in priority to the bank's charge, to an annuity payable to the Irish Land Commission of £120, to a Board of Works charge of £200, and to a mortgage debt of £1,098; that in the course of the negotiations for the sale of the estate Messrs. Moore, Keily, & Lloyd, solicitors for the defendant, were informed by the Congested Districts Board that a sale could only be made provided the annuity

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payable to the Irish Land Commission was redeemed, and that the advance necessary to redeem it should be a first charge on the lands; that to accomplish this it was necessary to obtain the consent of all persons who had charges on the lands; that, accordingly, on the 14th of January, 1914, Messrs. Moore, Keily, & Lloyd communicated with the solicitor for the bank, asking if the bank had any objection to the sum advanced for the purpose of redeeming the annuity taking priority to the bank's mortgage, and stating that there would be sufficient in any event to pay off the bank; that, acting on the assurance of Messrs. Moore, Keily, & Lloyd, the bank gave the necessary consent, and joined in the deed giving priority to the Congested Districts Board, and that their solicitor took no steps to obtain leave to prove the bank's claim in the matter, believing that the claim would be discharged out of the proceeds of the sale, and that the bank intended to rely on its security. The purchase-money, represented by the sum of £5,380 Guaranteed 3 per cent. Stock, came to credit on 11th January, 1916, and on the 19th of January, 1917, the final notice to claimants was issued, a note at the foot of which was the first intimation the bank had that its claim would not be discharged out of the purchase-money. It subsequently transpired when the stock came to be sold that the proceeds of the sale were insufficient to pay in full the mortgage which was immediately prior to the bank's mortgage; in these circumstances the bank claimed to be entitled to prove in this matter, the funds to the credit of which consist of £759 8*s.* 3*d.* 5 per cent. War Loan and £99 1*s.* 4*d.* cash.

The only allocation which has taken place appears to have been on the 16th of November, 1915, when Messrs. Moore, Keily, & Lloyd were paid a sum of £214 5*s.* 9*d.* in respect of costs.

The chief clerk's certificate in this matter was filed, and an order on further consideration was made over a year before the negotiations took place for the sale of the lands on which the bank's mortgage for £400 was secured. It appeared that at the time of the negotiations for the sale of the estate to the Congested Districts Board the Guaranteed Land Stock which was to be advanced for the purchase of the lands was quoted respectively at 77⅛ and 71⅛; that the calculations as to the security for the bank's claim were

based on these prices; and that if the stock could subsequently have been sold at either of these prices, the mortgage to the bank would have been paid, but that, owing to depreciation in the price of the stock to about 56, their claim was not met.

*O. Murphy*, for the Bank of Ireland :—

Subject to terms as to costs, a creditor is allowed in an administration suit to prove his debt at any time: *Harrison* v. [illegible] (1). The delay in proving by the Bank of Ireland is explained by the history of the case, as stated in the affidavits. In administration bankruptcy rules apply: Judicature Act (Ireland) 1877, sect. 28, sub-s. 1. In bankruptcy proceedings a creditor can have a special sitting for proof of debts at any time: Bankruptcy Amendment Act (Ireland), 1872, sect. 109; *Re Cormack* (2). Independently of the Judicature Act, according to the practice of the Chancery Division, the bank is entitled to come in and prove: *In re M'Murdo* (3). Down to 1917 the bank relied on the assurance of the solicitors having carriage that the bank would be reached. The bank was not bound to watch the rise and fall of Irish Land Stock: *In re M'Murdo* (3). In this case there has been no allocation, and we do not seek to vary the order made on further consideration.

*G. FitzGibbon K.C.*, for the defendant, the administrator, who was also a creditor of the estate :—

The bank can only come in subject to the rights of the other creditors. They can only affect the interest of the persons entitled to the residue: *Beattie* v. *Cordner* (4). The present is an insolvent estate, unlike the estate in *Harrison* v. *Kirk* (1). The bank never came in to prove, as they relied on their security, the lands. The fund has now been realized, and only awaits allocation. This application is, in effect, an application to vary the decree made in 1912, on further consideration, where the chief clerk's certificate was confirmed. There is no reported case where the chief clerk's certificate, confirmed on further consideration, was altered on review or rehearing. Formerly the Courts had power to

(1) [1904] A. C. 1.
(2) 5 I. L. T. R. 67.
(3) [1902] 2 Ch. 684.
(4) [1903] 1 I. R. 1.

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review and rehear, but that power was taken away by the Judicature Act, and given to the Court of Appeal. There is no statement in *In re M'Murdo* (1) that any order on further consideration had been made. [He also referred to *Turner* v. *Turner* (2); *Hull* v. *Falconer* (3).]

*H. R. Poole,* for the plaintiff, a creditor, also opposed the application.

*Cur. adv. vult.*

March 14.

POWELL J.:—

[Having stated the facts as above, the learned Judge proceeded:—]

This is an insolvent estate, and the question which I have to decide is whether or not, in all the circumstances, I should at this stage allow the bank to make and establish their claim.

The order on further consideration of the chief clerk's certificate was made on the 12th March, 1912.

The first case relied on by Mr. Oliver Murphy in support of the claim of the bank is *Harrison* v. *Kirk* (4).

In *Beattie* v. *Cordner* (5) Ronan L.J., who was then one of the counsel in support of the application, conceded that creditors who had already proved must have the same rights against the realized personalty as if it had been paid to them, and in reversing the Master of the Rolls, Lord Justice FitzGibbon stated the special terms upon which the application would be granted, first, upon the terms of the concession of Mr. Ronan, and, secondly, payment by the mortgagee of the costs of the application, including Mr. Harrison's costs and those of a creditor represented by Mr. Wilson, all parties to abide their own costs of the appeal.

In the House of Lords the judgments of Lord Shand and Lord Robertson seem to take into account the fact that the rights of the other creditors are not interfered with, and would receive effect notwithstanding the claim then made. Lord Davey, in the course of a very exhaustive judgment, does not appear to make this

(1) [1902] 2 Ch. 684.
(2) 1 Sw. 154; 1 Ja. & W. 39.
(3) 11 L. T. N. S. 761.
(4) [1904] A. C. 1.
(5) [1903] 1 I. R. 1.

concession any ground of his decision, but says that, as a result of the principles upon which the Court of Chancery acted in administration suits, and which are still binding upon the Chancery Division of the High Court, and also as a result of the authorities which had been referred to, his opinion was that where there are general assets in Court applicable to the payment of creditors, no authority had been or could be quoted in which the Court had refused to allow a legal creditor to come in and share in these assets which still remain, subject, of course, to conditions and terms such as those which he had already referred to. The only way, he says, in which a creditor with a legal right of action making that application can be met is by saying that he has in some way either released or abandoned his claim against the personal property or general estate of the testator. The terms which he had already referred to are to be found at page 6 of his judgment, in which he says:—"Of course, in admitting creditors to come in at any time to take the benefit of the decree, the Court is entitled to and does impose certain terms—terms, indeed, not affecting the legal right of the creditor, but affecting the mode in which he shall pursue his remedy. For instance, they require the creditor to pay the costs of the application which has been occasioned through his delay in coming in; and other conditions may be imposed upon the persons coming in at a late hour according to the circumstances of the case. And here a distinction must be drawn. In the argument of the appellant he did not always bear in mind the distinction between the case where there is still remaining in Court a residue or a fund legally applicable to the payment of debts and the case where the whole of the estate has been distributed, and it is necessary, in order to obtain payment, for the creditor to get back from legatees or others who had been paid the money which had been paid to them. In the first case the creditor is exercising merely a legal right; in the other he is exercising an equitable right which is given to him by the equitable doctrines of the Court of Chancery, because he has no legal right against the legatees; he has no legal right against the residuary legatee; his only legal right is against the executor; but the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what was really applicable to the payment of

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another man, devised a remedy by which, where the estate had been distributed either out of Court or in Court without regard to the rights of a creditor, it has allowed the creditor to recover back what had been paid to the beneficiaries or the next-of-kin who derived title from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim."

Mr. FitzGibbon points out that in *Harrison* v. *Kirk* (1) the estate was solvent, and the creditors would all be paid; he also points out that it does not appear in the case that any order on further consideration had been made, and that when an order for further consideration has been made, the Court has no power to vary it, and that the only machinery by which it can be varied is by an appeal. He also relied strongly upon the delay of the bank which took place prior to the negotiations between the bank and Messrs. Moore, Keily, & Lloyd, the chief clerk's certificate having been filed and the order on further consideration having been made over a year before any negotiations took place for the sale of the land on which the bank mortgage was secured. But as to this point Lord Davey seems to have decided that the only way in which a creditor with a legal right of action making such a claim as this can be met is by showing that he has in some way either released or abandoned his claim against the personal property or general estate of the testator; and I cannot hold in this case that the Bank of Ireland, notwithstanding the delay, have either released or abandoned their claim.

Mr. Murphy relies also on the case of *In re McMurdo, Penfield* v. *McMurdo* (2). The estate in that case was insolvent, and an order was made for its administration. A creditor for £47,000 held as security certain shares and debentures of the Delagoa Bay Railway. The railway was seized by the Portuguese Government, and an arbitration tribunal was appointed in 1891. The creditor declined to prove his debt, and preferred to rely on his securities. In 1893 the chief clerk filed his certificate, in which the creditor's claim was entered as disallowed. In 1900 an award was made, and resulted in the creditor only receiving £1,448 in respect of the shares and debentures. In January, 1902, the creditor took out a summons to vary the certificate by allowing his claim, and for

(1) [1904] A. C. 1. (2) [1902] 2 Ch. 684.

liberty to prove for his debt. Mr. Justice Swinfen-Eady held that the Chancery practice still applied to the administration of insolvent estates, although by sect. 10 of the Judicature Act of 1875, the Bankruptcy rules were also in force, and that, therefore, the creditor could not come in and prove after the certificate, unless he showed special circumstances in his favour, and that he had not done so. It was held by the Court of Appeal that under sect. 10 of the Judicature Act, 1875 (which corresponds to sect. 28 of our Judicature Act of 1877), the Bankruptcy rules applied to the case, and that under them the creditor could come in and prove at any time if there were assets undistributed and if no injustice would be caused; that he could do the same thing in an administration in the Chancery Division; that the disallowance of his debt in the certificate was not a fatal objection; that if it was necessary to show special circumstances, he had done so; that the certificate need not be varied, and that the creditor must be allowed upon terms to come in and prove. Also that a mortgagee of shares is not bound to watch the market so as to sell them at the highest price, and he does not by failing to sell at the most favourable opportunity lose his right to prove against the estate of the mortgagor. Vaughan Williams L.J., who had great experience of Bankruptcy practice, says, at p. 699 :—"According to my experience of Bankruptcy practice there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at at any time during the administration, provided only that he does not by his proving interfere with the prior distribution of the estate among the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose, and of course in every case in which there has been a time limit for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the Court. If that is so, leave must be granted upon such terms as the Court may think just." In reference to the point that the securities there held by the creditor while they were in his control might have been dealt

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with by him, and at one time were of greater realizable value than they were then, the Lord Justice says:—"It seems to me that it is impossible to say that because the securities have altered in value that in any way estops the creditor from carrying a proof here." Romer L.J., dealing with the matter from the point of view of Bankruptcy practice, says:—"As a rule no injustice is done when a creditor comes in, for the Bankruptcy Court will always impose terms which will prevent any unnecessary delay in the administration of the estate in Bankruptcy being caused by the lateness of the creditor coming in, and, as a rule, subject, as I have said, to care being taken that no injustice is done, by special order the Bankruptcy Court will undoubtedly, notwithstanding rule 1, allow a creditor, notwithstanding his delay, to come in and prove and share in undistributed assets. I will not say that there may not be special circumstances that might justify the Bankruptcy Court in refusing to admit a creditor who came in late, but I have stated what I conceive to be the general rule and practice of the Bankruptcy Court." The Lord Justice then refers to the particular circumstances which caused the delay of the creditor in the case in question, and he goes on to say: "Under those circumstances can it be said that by reason of the delay the appellant ought not to be allowed to come forward now when the funds in Court have not been distributed, and ask under the circumstances that he as a creditor who has not been paid by his securities should be allowed to share as against the undistributed balance? I think not, assuming always that care is taken by terms not to allow the winding up of this estate to be further delayed by reason of the delay in the appellant making his present application for leave to prove. If the appellant is allowed to come and prove, no injustice will be done. There has been no change of parties. The only thing which can be said which would require the Court's attention in dealing with the matter specially is the fear that the delay of the appellant may lead to further delay in the administration of the estate, and that can be properly guarded against." And the learned Lord Justice then proceeds (p. 709):—"It is said that this is not an administration in Bankruptcy, and it is said that the applicants here are in a much worse position because it is an administration in the

Chancery Division and a certificate has been made. To my mind, that is not in any way fatal to the appellants. Sect. 10 of the Judicature Act of 1875 undoubtedly applies to this case. I do not say that that has done away with the Chancery practice in an administration action, or that for the purposes of the present case we are to treat the Bankruptcy practice as incorporated with or over-ruling the Chancery practice. Nothing of the kind; but sect. 10 all the same applies, and so far as it is consistent with the Chancery practice the Bankruptcy rules apply and should be applied, and if this secured creditor in bankruptcy would have been allowed now to come in and prove, to my mind he ought to be allowed to come in in the Chancery Division, the estate being insolvent, unless there is some Chancery practice which prevents it. Is there any Chancery practice which prevents it? Is it prevented by the certificate? Not so. I have pointed out, so far as a certificate is concerned, what its effect and meaning is, and what in particular the word 'disallow' means in this certificate; and on the general question I wish to point out that according to Chancery practice a creditor, after a certificate has been made as to debts, and notwithstanding the certificate, is, as a rule, allowed to come in where there are assets undistributed and share in the administration of those assets, of course in each case on such terms as to the Court seem just. There is no difficulty in the present case. In the first place, it appears to me that the certificate, having regard to what we now know to be the meaning of the word 'disallow,' need not be varied. I think it would be quite sufficient to say that the creditor should be allowed to come in and prove notwithstanding the certificate; but even if it had been formally necessary here to vary the certificate, I should still have felt no difficulty, for under Order 4, rule 71, I certainly am of opinion that there would have been special circumstances which would have justified and bound the Court in justice to vary the certificate, of course taking care always to cause no injustice in the way I have previously referred to. That disposes of the case."

As to this case, Mr. FitzGibbon's answer is that, as in *Harrison* v. *Kirk* (1), no order on further consideration had been made, which, I believe, is admitted, and appears to be stated in another report of the case.

(1) [1904] A. C. 1.

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In *In re Metcalfe, Hicks* v. *May* (1), James L.J., reversing the decision of Fry J., said:—"Having regard to the position of this entry in the book, and to the fact of the book having no index, there is no ground for saying that the applicant ever knew of the existence of this entry, or was guilty of any negligence in not knowing of it. The interest now in question has never been the subject of decision. We are not reviewing any decision; it is merely a case of carrying in a claim for an amount which the applicant by mistake omitted previously to claim. I think, therefore, that the petitioner ought to have liberty to add the amount of interest shown by the entries to have been due at Anthony Metcalf's death to the amount which has been found due by the certificate to Anthony Metcalfe's estate." Bagally and Thesiger L.JJ. concurred. Of course in that case no question appears to have arisen as regards the rights of creditors; but the fact that there had been an order on further consideration made on the 9th April, 1879, which appears to have found that John Metcalfe's estate owed Anthony Metcalfe's estate £496 14*s.* 5*d.*, was held not to prevent that sum being permitted to be increased by the additional sums claimed in the petition.

In *Gillespie* v. *Alexander* (2), in a suit for the administration of a testator's assets, after the decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in Court to be apportioned among the other legatees, a creditor obtained permission to prove his debt. The Master subsequently reported the debt to be due to him; but, in the meantime, the fund had been apportioned, and part of it paid over, while the remainder had been carried to the account of the legatees. It was held that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only a part of it bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will.

Mr. FitzGibbon does not contest the equitable principle that moneys, even in the hands of legatees, may be made available for the payment of debts due by a deceased person. But I think the

(1) 13 Ch. D. 236. (2) 3 Russ. 130.

case is important as showing that the order on further consideration did not, although not appealed from, prevent a claim from being partially allowed as against funds in Court, although not included in the chief clerk's certificate, confirmed by the order on further consideration.

The Lord Chancellor, in his judgment, said that although the language of the decree, where an account of debts was directed, was that those who did not come in should be excluded from the benefit of the decree, yet the Court is to permit a creditor, he paying the costs of the proceedings, to prove his debt so long as there happens to be a residuary fund in Court, or in the hands of the executor, and to pay him out of that residue. If a creditor did not come in till after the executor had paid away the residue, he would not be without a remedy, though he was debarred from the benefit of the decree. He might sue the legatees to bring back the fund; but he cannot affect the legatees except by suit, and he could not affect the executor at all.

Lord Eldon had not delivered a final judgment when he resigned the Great Seal, but after he had quitted the office, the parties having consented to be bound by his opinion, he gave the following decision: "I am of opinion that, although, if the fund carried to the account of a legatee was residue, after payment of the debts and legacies, the creditor would be entitled to be wholly paid, yet, if adult legatees are paid, and, on the other hand, legatees who are infants or have only partial interests are not paid, but have funds carried to their account, such last-mentioned legatees ought to be considered, as between themselves and the creditor not coming in sooner, as not liable to pay him wholly out of what is so carried to their account, but only to pay him a due proportion of the debt, and that he must seek the payment of the rest of his debt, in proper proportions, against those who have been actually paid. I think, therefore, this order must be altered, and the creditor take only such proportion; leaving the creditor at liberty to apply, as he shall be advised, against other legatees paid, and against the funds which may yet come in, and leaving these petitioners also at liberty to apply, as they may be advised, against funds which may yet come in." Although this is a case between creditors and legatees, I think it shows that the decree

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on further consideration sanctioning payments made by an executor in discharge of legacies, and directing the fund in Court to be apportioned amongst the other legatees, was not held to prevent the Court from making an order which in fact altered the apportionment.

In *Montefiore* v. *Browne* (1) Lord Chelmsford C., at p. 264, says :—"The right of the respondent having been clearly shown to exist, your Lordships would naturally wish that he should be enabled to assert that right in the shortest and least expensive manner, at the same time that you would feel, as in *Champernowne* v. *Brooke* (2), that it would be a dangerous thing to establish a precedent for a departure from the regular course of proceeding in order to meet the acknowledged justice of an individual case. But I think it may be considered to be competent to the Court of Chancery to deal with the fund so long as it remains in Court or under its authority by orders such as have been made in the present case, notwithstanding the previous final decree, and this is sanctioned by the decision of Lord Eldon in *Gillespie* v. *Alexander*" (3). And Lord Cranworth says, at p. 269 :—"The only remaining question is on the matter of forms, whether, after the Master's report and the decree on further directions, it was consistent with principle and practice to let in the creditor to insist on the claim under the deed. I think that may be done. The estate or the money produced by the sale is in the nature of a fund in Court. The practice in such cases has always been, at least in modern times, to let in all cases, whatever decree may have been made for its distribution."

Mr. FitzGibbon relied on an old case of *Turner* v. *Turner* (4), the marginal note of which states :—"It is not competent to the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls containing consequential directions while that decree stands"; and the marginal note on page 156 is as follows :—"In a case which has been much delayed the Court will not at the expense of further delay relieve the plaintiff from the consequence of the gross neglect of his solicitor." The note to that case (p. 156) states that the

(1) 7 H. L. C. 241.
(2) 3 Cl. & F. 4.
(3) 3 Russ. 130.
(4) 1 Sw. 154; 1 Ja. & W. 39.

general competence of the Court to direct a review of a report after confirmation seems necessarily implied in this proposition. It goes on to say :—"Few reported decisions, however, occur in which that course has been pursued. The Practical Register states the doctrine thus : 'After a report is confirmed the Court will not easily, if at all, stir it upon pretence of an omission or mistake if the parties had sufficient time to except to it ; and if they will not mind their business, it is their own fault' "; and in a case referred to in the notes, at p. 158, of *Hawkins* v. *Day* the Lord Chancellor appeared to be of opinion that in the particular circumstances of that case and upon the terms mentioned the petitioner should have liberty to re-argue the exceptions formally taken by the Master's report mentioned in the petition, and to take new exceptions to the report relating to matters complained of in the petition. This case of *Turner* v. *Turner* (1) reached a further stage, as reported in 1st Jacob & Walker, p. 39. The Master of the Rolls said the cause came before the Court for a re-hearing in a very late stage of the proceedings, after the Master's report had been confirmed, without exception having been taken to it, and after a decretal order had been made and acted upon ; that some of the matters complained of seemed to be subjects of direct objection to the report ; that the parties had opportunities of attending before the Master to make these objections, but if they were made they were not allowed ; and it then became the duty of the parties to convert them into exceptions at the proper period, but that this was not done ; that the report was confirmed and the decretal order subsequently pronounced in a manner which, though the plaintiff did not appear, was perfectly regular ; that the application that had been made to the Lord Chancellor, that the Master might review his report, had been refused ; that the plaintiff had all these disadvantages to contend with now ; and that whatever might have been plaintiff's misfortune with respect to the persons he employed, when a suit had been pending for so long a period, it was incumbent on the Court to take the utmost care that there should not be further delay which was not absolutely necessary. If this is relied upon as a decision that an order on further

(1) 1 Sw. 154 ; 1 Ja. & W. 39.

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consideration cannot be affected by the claim of a creditor whose debt does not appear on the chief clerk's certificate, it has apparently not been followed in more modern decisions. In the case of *In re Metcalfe, Hicks and May* (1), as I have pointed out, there had been an order on further consideration, and yet the Court of Appeal allowed the carrying in of a claim for an amount which had not been allowed by the chief clerk's certificate, confirmed by the order on further consideration. I think it would also have been an answer to the application in *Gillespie* v. *Alexander* (2). But whether that be so or not, I do not think that my decision in this case will be inconsistent with the decision in *Turner* v. *Turner* (3). Two years previous to the decision in that case, namely, in the year 1816, a case was decided by Sir Thomas Plumer, Vice-Chancellor, of *Angell* v. *Haddon* (4), where, on a motion on behalf of a creditor to be allowed to prove his debt under the decree, the creditor swore he was not aware of the decree. The motion was opposed on the ground that it was too late, the money having been apportioned among the creditors, the assets being insufficient, and the money transferred to the Accountant-General to pay them and the costs of the suit, and it was held that if such a motion were allowed it must be on the condition of the applicant paying the costs of the motion and the expense of re-apportioning the fund among the creditors.

There is an older case, one decided in 1803, the decision in which, having regard to sect. 28 of the Judicature Act of 1877, may have some bearing on this matter, namely, *In the Matter of Wheeler, a Bankrupt* (5). There Lord Redesdale C. said:—"I have observed a practice here different from that in England, that where a creditor comes forward to prove after a dividend has been made, he is not allowed any benefit of that dividend, but is only admitted to receive his share of the future dividends. I do not think this is warranted by the statute. It may be that a creditor has kept back from some fraudulent intent, or with a view to delay the proceedings. In such a case the practice may be proper; but where everything on the part of the creditor has been fair,

(1) 13 Ch. D. 236.
(2) 3 Russ. 130.
(3) 1 Sw. 154; 1 Ja. & W. 39.
(4) 1 Madd. 529.
(5) 1 Sch. & L. 242.

and the delay is occasioned by accident or unavoidable circumstances, the Commissioners ought to apply the fund in the first place to put such creditor on a footing with the others. If the effects are not sufficient for that, the other creditors can have no further dividend. If there be, all must take alike in the future dividend."

Mr. FitzGibbon also cited a case of *Hall* v. *Falconer* (1). In that case the funds had been duly apportioned among the creditors in pursuance of an order on further directions, the affidavit of apportionment being dated the 17th December, 1864, and cheques for the amount of the dividend had been since signed by the Accountant-General, though they had not been countersigned. A creditor moved to stay the payment of the dividend in order that she might have an opportunity of applying to the chief clerk and be enabled to come in and obtain her dividend with the other creditors. The Vice-Chancellor said that the order on further consideration directing payment of the dividend to the creditors was equivalent to the actual payment of them, as the matter had passed out of the hands of the chief clerk into those of the Accountant-General, who had been ordered to pay specific sums to each of the creditors. The creditor had had ample opportunity of coming into prove, and having neglected to prove, must take the consequences of her laches, and could not now be allowed to disturb the dividend to the other creditors. It will be observed that the ground of the decision in that case was the neglect and laches of the creditor, but, as I have pointed out, having regard to the judgment of Lord Davey in *Harrison* v. *Kirk* (2), I do not feel at liberty to hold that there was negligence or laches in this case disentitling the Bank of Ireland to the order sought.

In *Greig* v. *Somerville* (3), in a suit instituted in 1814 to administer the personal estate of an intestate who died in 1807, the Master reported that no debts had been proved, and by the decree on further directions in 1817 the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained and carried to a separate credit. In 1825 a person claiming to be a creditor of the intestate petitioned for leave to prove his debt

(1) 11 L.T. (N.S.) 761. (2) [1904] A.C. 1. (3) 1 Russ. & Myl. 338.

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against the sums remaining in Court, and it was held by Lord Lyndhurst that he was not precluded from tendering his proof before the Master, subject, if the debt were established, to be restricted as against the fund in Court to the appropriate proportionate part.

No doubt the rights of other creditors were not affected by the decision; but the decision shows, I think, that rights settled at the time by an order on further consideration are capable of being re-adjusted notwithstanding the order.

I think the judgments in *Penfield* v. *McMurdo* (1) and *Harrison* v. *Kirk* (2) are inconsistent with the contention of Mr. FitzGibbon that the question in this case is not open by reason of the order on further consideration. In this connexion I refer to another passage in the judgment of Vaughan Williams L.J. at p. 701: "It is quite true that the effect of the certificate is that the creditor not having come in within the time limited has no longer any right to the benefit of the order or decree without some subsequent order by the Court, some supplementary certificate"; and he says: "I say again that upon the authorities which have been cited to us, including the authority of Lord Eldon in *Gillespie* v. *Alexander* (3), it is plain that the right to apply for leave to prove, to put it shortly, out of time, is a right which has been recognized again and again in administrations. Under those circumstances, I really do not think that it makes very much difference whether one looks at this proof as if it were carried in in Bankruptcy or carried in in the administration in Chancery. In either case, it seems to me that by the machinery of what is in effect a supplementary certificate, upon proper terms the Court would allow a creditor to come in." Applying that language to the present case, it seems to me that I am bound to recognize the right to apply for leave to prove out of time, because it is a right which has been recognized again and again in administrations, and that by the machinery of what is in effect a supplementary certificate, on proper terms I should allow the creditors in this case to come in.

I think that the House of Lords have decided in *Harrison* v. *Kirk* (2), that unless a creditor has released or abandoned his claim

(1) [1902] 2 Ch. 684. (2) [1904] A.C. 1. (3) 3 Russ. 130.

against the personal property or general estate of a testator, the Court is not at liberty to refuse to allow a legal creditor to come in upon terms, and to share in the general assets which are in Court applicable to the payment of creditors, and that according to the judgment of Vaughan Williams L.J., in *Penfield* v. *M'Murdo* (1), this can be carried out by the machinery of what is in effect a supplementary certificate, without reversing, altering, or varying the order on further consideration.

I shall therefore make an order (in the terms of the summons) that, notwithstanding that the times for applying to vary the chief clerk's certificate and for making claims in the action have expired, the applicants be at liberty to make and establish their claim in this matter, the applicants to pay the costs of these proceedings and any further costs consequent upon this order.

If it be considered necessary, I will add that this order is not to delay the proceedings in the action so far as concerns the other creditors, but that the applicants are to be at liberty, in the event of any contemplated distribution of the assets before their claim is ascertained, to apply to have a sum set apart to answer their claim to share in the distribution.

Solicitor for the Bank of Ireland: *C. J. Rutherford.*
Solicitors for the plaintiffs: *Baker, Ringwood, and Gordon.*
Solicitors for the defendant: *Moore, Keily, and Lloyd.*

D. M. S.

(1) [1902] 2 Ch. 684.

*Ross J.*
1919.
May 6, 9.

## IN RE THE NEWRY, KEADY, AND TYNAN RAILWAY CO.

*Railway — Abandonment of Undertaking — Application of Deposit Fund— Compulsory powers—Persons "subjected to injury or loss in consequence thereof"—Costs of arbitration—Newry, Keady, and Tynan Light Railway Act*, 1900 (63 & 64 *Vict. c. cclxxv*), *s.* 56—*Newry, Keady, and Tynan Light Railway Act*, 1909 (9 *Ed. VII, c. cxl*), *s.* 20—*Railways Act* (*Ireland*), 1851 (14 & 15 *Vict. c.* 70), *s.* 13.

Pursuant to certain local Acts of Parliament, a railway company was formed to make a railway. The persons through whose lands the railway was to run, by invitation of the company, appeared before the arbitrator, and employed engineers and solicitors, in respect of whose fees and costs they incurred liability, but the undertaking was ultimately abandoned.

*Held*, that everything done after the appointment of the arbitrator was done in exercise of the company's compulsory powers; that the liability for the costs and fees was "injury or loss in consequence" thereof, within sects. 56 and 20 (which were in the common form) of the Newry, Keady, and Tynan Railway Acts, 1900 and 1909 respectively; and that therefore such fees and costs were a first charge upon the parliamentary deposit fund.

*Uxbridge Case* (43 Ch. D. 536) held not applicable to proceedings at a similar stage in Ireland.

SUMMONS to vary the chief clerk's certificate. Pursuant to certain local statutes, the Newry, Keady, and Tynan Railway Company was formed for the purpose of constructing a railway to run through portions of the counties of Down, Monaghan, and Armagh, and the necessary parliamentary deposit fund was duly lodged in Court. The owners and occupiers of the lands through which the projected railway was to run attended the arbitration by invitation of the company, and became liable for costs and fees due to the solicitors and engineers employed by them in support of their claims. The arbitrator held inquiries, and subsequently made his final award, but through lack of funds the projected undertaking was ultimately abandoned (1). The money for the deposit fund was

(1) Newry, Keady, and Tynan Light Railway Act, 1900, s. 56:—"If the company do not previously to the period limited for the completion of the railway complete the same . . . the deposit fund . . . shall be . . . applied towards compensating any landowners or other persons . . . . who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company," &c. Sect. 20 of the Act of 1909 dealt in similar language with the fund described as the "new deposit fund."

provided by the Bank of Ireland, being secured by Mr. Arthur M'Cann and others, all of whom save Mr. M'Cann were dead. In 1917 Mr. John Kennedy, a judgment creditor of the company, filed a petition praying for inquiries as to the payment of compensation to the parties entitled, and, subject thereto, for the application of the deposit fund as assets of the company for the benefit of the petitioner and other creditors. Inquiries having been directed, the chief clerk found that no landowner or occupier had proved that he had been subjected to injury or loss in consequence of the exercise of the compulsory powers. The present summons was brought by the said landowners and occupiers to vary the certificate in this respect.

*H. Wilson K.C.* (with him *Davison*), for the applicants:—

It is submitted that the applicants are entitled to this fund in priority. *In re Uxbridge and Rickmansworth Railway Co.* (1) at first sight appears to be against this contention; but a notice to treat under sect. 18 of the Lands Clauses Consolidation Act, 1845, does not necessarily lead to compulsory purchase; it may lead to agreement. In its nature it may lead either to agreement or to disagreement. A new code was provided for Ireland by the Act of 1851, and in Ireland once the arbitrator is appointed the parties are at issue. Consequently, the *Uxbridge Case* (1) does not apply. In any event the claimants are creditors: the *Uxbridge Case* (1). [They also referred to *Guest* v. *Poole and Bournemouth Railway Co.* (2).]

*Pigot K.C.* and *Lardner*, for M'Cann:—

Mr. Wilson's clients are not creditors, not having the certificate from the arbitrator required by sect. 13 of the Railways Act (Ireland), 1851: *Agnew to Keenan* (3). Nor can they claim priority as persons injuriously affected under sect. 56 of the Act of 1900: *In re Uxbridge and Rickmansworth Railway Co.* (1). True, there is a distinction between the procedure in England and that in Ireland; but sect. 18 of the Lands Clauses Consolidation Act, 1845 (which applies in England)—the "notice to treat" section—follows sect. 15, which provides that the sections following

(1) 43 Ch. D. 536. (2) 5 C. P. 553. (3) [1900] 1 I. R. 33.

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apply to "the purchase and taking of lands otherwise than by agreement." Accordingly, the *Uxbridge Case* (1) must be taken as though it dealt with a case of compulsory purchase as much as if an arbitrator had been appointed under the Irish Act of 1851.

*S. L. Brown K.C.* and *Newett*, for Kennedy:—

There has been no exercise of compulsory powers, and even if there had been the claimants have suffered no damage: the *Uxbridge Case* (1). The claimants have not in fact been damaged to the extent of one farthing; they have not paid costs or fees, nor could they be made to pay them, as they are now statute-barred. They cannot claim as creditors, as there is no certificate from the arbitrator within sect. 13 of the Lands Clauses Consolidation (Ireland) Act, 1851.

*Redmond*, for the company.

*Davison*, in reply:—

Procedure by way of certificate is only intended as a method of execution against assets of the company. Even if certificate had been granted, the Court would not be bound by it, and has power under the section to allow more if of opinion that the compensation allowed is inadequate. The non-payment of costs is immaterial. In an action for damages for personal injuries a jury is entitled to take into account fees due to a doctor, though such may not have been paid in fact. Even if the Statute of Limitations applies, the debt still exists; it is the remedy only that is barred, and the clients are not bound to plead the statute. Further, the cause of action only accrues on completion of the work: *Coburn* v. *Colledge* (2); *Harris* v. *Osbourn* (3), or on the abandonment of the undertaking. This claim is an entirely new right given by statute, and it is the duty of the Court to consider whether the applicants have suffered loss. The only questions are—Have the applicants suffered loss, and is the loss a consequence of the exercise of compulsory powers? The judgments in the *Uxbridge Case* (1) show that that decision would have been different if the parties had got as far as arbitration.

*Cur. adv. vult.*

(1) 43 Ch. D. 536. (2) [1897] 1 Q. B. 702. (3) 2 C. & M. 629.

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The questions for decision arise on further consideration of the chief clerk's certificate, which is sought to be varied in certain respects.

By the Newry, Keady, and Tynan Light Railway Act, 1900, certain promoters were united into a company for the purpose of making and maintaining the railways therein described. Pursuant to the standing orders of both Houses of Parliament certain sums were deposited pursuant to the said Act and subsequent Acts. In value and in cash a sum of about £11,000 now represents the deposit fund. Section 56 of the Act directs how the said deposit fund is to be applied. Section 72 provides that all costs, charges, and expenses of obtaining the Act shall be paid by the company. By the Ulster and Connaught Light Railways Act, 1903, it was provided inter alia that the original period for completion, namely, five years, should be extended for a period of three years more. Subsequent Acts dealing with the undertaking or modifications and alterations thereof were passed in 1905, 1909, 1912, under which the time for completion was extended. The effect of sect. 56 in the original Act is continued in all, and they all contain clauses dealing with the costs, charges, and expenses similar to sect. 72.

On 20th December, 1917, all the periods fixed by the said Acts had expired. None of the railways had been completed or even commenced. No land was acquired by the company, and the powers of the company for compulsory purchase expired on 20th December, 1915. All the original directors and depositors are dead except Mr. Arthur M'Cann, and he is surety to the bank for the moneys advanced to form the deposit fund. An arbitrator was appointed by the Commissioners of Public Works, who held various sittings, made his draft award, and afterwards made his final award. In a few cases he awarded costs to the land-owners and occupiers who made claims before him, but in the majority of the cases he made no award of costs.

The petition in this matter which was filed in 1917 by Mr. John Kennedy prays for inquiries as to the payment of compensation to the parties entitled, and, subject thereto, that the

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deposit fund should be applied as assets of the company for the benefit of the Petitioner and the other creditors. An order was made by Mr. Justice Barton on the hearing of the petition on 3rd December, 1917. It declared that the undertaking was abandoned, that the deposit fund, subject to the payment of compensation to the parties entitled, should be applied as part of the assets of the company for the benefit of the creditors, and that, subject thereto, the said deposit funds belonged to the depositors. Enquiries were directed as to the injuries sustained by the land-owners and occupiers, and the amount of compensation, also as to creditors and the amounts due to them, and whether any person other than the depositors was entitled to the residue of the funds. The chief clerk made up his certificate on the 8th of November, 1918. He disallowed all the claims of land-owners and occupiers and other such persons claiming on account of injury or loss. He allowed the claim of the petitioner, who obtained a judgment in the King's Bench Division for £5,442 8*s.* 5*d.* He has also allowed the claims of the other creditors, which with the amount of the petitioner's claim amount to £6,749 19*s.* 6*d.*

A summons is before me to vary the certificate by allowing the claims of the land-owners and occupiers, and it is here that the difficulty in the case arises. This brings us to sect. 56 of the Act of 1900, dealing with the application of the parliamentary deposit fund in case of failure to complete or abandonment, which has happened. First, it is to be applied towards compensating land-owners or other persons whose property has been interfered with or rendered less valuable. As no land has been taken or interfered with, this provision does not apply.

The next class who have claims on the fund are persons who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, who have not been compensated or inadequately compensated. This is the clause under which the present applicants claim payment in priority. Alternatively they claim as creditors under a later provision in the section in case they are not entitled under the clause to which I have referred. The way in which they allege themselves to have been injured is this: they say they were obliged in defence of their rights and their property to

appear before the arbitrator on the occasion when the draft award and final award were being made; that they were obliged to employ solicitors and experts on the value of land; that they have incurred liability to those whom they employed; and that this is injury or loss within the meaning of the section.

This parliamentary deposit does not belong to the company—it can only be applied by the Court as part of the assets of the company by virtue of the express words of the section. This is so, although the primary object of the deposit was to compensate land-owners or persons who have been subjected to injury in consequence of the compulsory powers. Two things are necessary to enable them to sustain their claims—first, there must be injury or loss within the meaning of the section; and second, such injury or loss must be the result or consequence of the compulsory powers. On the fair construction of the section, I think there can be no doubt that the liability to their solicitors is a loss or injury within its meaning. But is it a loss in consequence of the compulsory powers? This is an ambiguous expression. It can mean in consequence of the existence of the compulsory powers, or in consequence of the exercise of the compulsory powers. That the latter view is the correct interpretation is definitely settled by the decision of the English Court of Appeal in the *Uxbridge Case* (1), and the cases therein referred to. That decision, so far as I am concerned with it, settles this—that the mere service of a notice to treat was not an exercise of compulsory power so as to entitle a landlord to priority under a similar section. The then Master of the Rolls (afterwards Lord Esher) says, in *Guest* v. *Poole and Bournemouth Railway Company* (2): "A notice to treat assented to by the land-owner would not be an exercise of the compulsory powers, but a notice to treat not assented to—in which case the company would be placed in a situation of hostility to the land-owner—would be." From this I take it that if anything is done that puts the company in conflict with the land-owner, that would be an exercise of the compulsory powers. The question, therefore, is whether what has taken place has put the claimants in conflict with the company.

(1) 43 Ch D. 536.

(2) 5 C. P. 553, at p. 560.

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In that case the loss incurred has been in consequence of the exercise of compulsory powers.

The law regulating the procedure in Ireland differs altogether from the law in England. By the 3rd section of the Railways (Ireland) Act, 1851, all the sections of the Lands Clauses Act, 1845, dealing with the taking of land by compulsion, except two, are not applicable to a railway in Ireland. There is no notice to treat as in England. The system is what we are all familiar with—that of the deposited plans, with the name of the reputed owners; then the appointment of an arbitrator by the Commissioners of Public Works; then the inquiry and adjudication; then the draft award, notice of which must be served; then the objections and the final award.

Now, in all these cases the parties got so far as the final award, and it would appear to me that after the appointment of the arbitrator everything that was done was done in exercise of the compulsory powers, and that the claimants are entitled to the amount they claim, subject to taxation. It was faintly argued that as the parties could plead the Statute of Limitations to the claims of their solicitors, there is no loss by reason of their liability. But the parties cannot be compelled to raise the statute against their solicitors, and, as a matter of fact, in every case the solicitor is the real claimant.

I do not express any opinion upon the alternative contention that the parties under the later clause are entitled as creditors.

Solicitors for the appellants: *Monroe & Anderson.*
Solicitors for Kennedy: *W. J. Shannon & Co.*
Solicitor for M'Cann: *A. Gartlan.*
Solicitors for the company: *R. A. Mullan & Son.*

T. C. T.

## BARRETT *v.* HANBURY.

(1919. No. 75.)

*M. R.*
1919.
Feb. 18.
April 2.

*Settlement—Graft—Lease for lives—Sub-demise by owner of the lease upon the trusts of the settlement—Fixing of fair rent by tenant for life under the settlement—Land Law (Ireland) Act,* 1896 (59 & 60 *Vict. c.* 47), *sect.* 11—*Land Law (Ireland) Act,* 1887 (50 & 51 *Vict. c.* 33), *sect.* 1.

Under a lease dated the 1st day of May, 1841, lands were held for lives and a concurrent term of thirty-one years with a covenant against sub-letting without the consent in writing of the lessor. A portion of the lands was by indenture dated 1st day of May, 1853, sub-demised to S. for the lives in the head lease, and for the residue of the term of years less one day. The term of years expired in 1872. By indenture of marriage settlement, dated the 13th day of October, 1874, the lands comprised in the sub-demise were demised by S. to trustees for 100 years if cestuis que vie in the original lease should so long live. The settlement contained express covenants for right to convey quiet enjoyment and further assurance. Neither lessor nor sub-lessor consented to this sub-demise. There were four children of the marriage. The settlor, who was tenant for life, applied to the Land Commission to have a fair rent fixed. He died intestate after the hearing and before any order was made. After his death an order fixing a fair rent was made in his name. On his death his widow M. took out letters of administration to his personal estate, and became tenant for life under the settlement, and went into possession. The lands were subsequently purchased by M. under the Irish Land Purchase Acts, and the fee-simple therein was vested in her by order of the Land Commission, subject to equities.

*Held*, that the estate so acquired was a graft upon the previous interest of the tenant under the settlement which enured for the benefit of the settlement.

This was a summons in the matter of an indenture of settlement, dated the 13th day of October, 1874, and made between Samuel Hanbury of the first part, Margaret Barrett of the second part, and James Barrett and Richard Hugh Hanbury of the third part; and in the matter of the estate of Samuel Hanbury, between Mary Augusta Barrett and Louisa Hanbury, plaintiffs; and Samuel Barrett Hanbury, Margaret Hanbury, and Jane Carlos Robinson, defendants; brought by the plaintiffs as trustees of the said settlement, which was executed on the

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marriage of Samuel Hanbury the younger with Margaret Hanbury for the determination of the question as to whether the said Margaret Hanbury, one of the defendants, was entitled during her life for her own benefit to that part of the lands of Ginnett's Great, the subject of folio 2322 of the Register for county Meath; and also whether the plaintiff, Louisa Hanbury, and the defendant, Samuel Barrett, were beneficially entitled under the above-mentioned settlement to the said lands in fee simple in remainder expectant on the death of the said Margaret Hanbury.

By a lease, dated 1st May, 1841, the lands with others were demised by Lady Dufferin to Samuel Hanbury the elder, his heirs, executors, administrators, and assigns, for three lives therein named, and the survivors and survivor of them, and for a concurrent term of thirty-one years from the date of the lease, subject to the payment of a yearly rent of £291 15*s.* 2*d.* The lease contained a covenant against subletting without the consent in writing of the lessor.

By a sub-lease, dated the 1st May, 1853, the lessee sub-demised to his son Samuel Hanbury the younger, his heirs, executors, administrators, and assigns the lands of Ginnett's Great (being only a portion of the lands demised by the original lease) for the lives contained in the original lease, and the survivors and survivor of them, and for the residue of the term of thirty-one years mentioned in the original lease (which had then nineteen years to run), less by one day, at the yearly rent of £150 15*s.* 10*d.* This sub-lease contained a covenant against assigning or subletting or sub-dividing without the consent of the original lessee, his heirs, or assigns. The consent of the agent of the original lessor was indorsed on this sub-lease. The term of thirty-one years expired on the 1st May, 1872, while the lives or some of them were then in existence, and as from that date the sub-lease operated as an assignment under the Landlord and Tenant Act, 1860. By the indenture of settlement, dated 13th October, 1874, Samuel Hanbury the younger demised to trustees therein named the said lands of Ginnett's Great for a term of 100 years if the cestuis que vie named in the lease of 1841 should so long live in trust after the marriage to permit Samuel Hanbury the younger to receive the rents thereof until his death or the happening

of any of the events therein specified (none of which occurred), and after the determination of his interest to pay out of the rents and profits the yearly rent of £150 15s., and to pay the balance of the rents and profits to Margaret Hanbury during her life, and after the determination of these trusts to stand possessed of the lands upon trust for the children of the marriage as Samuel Hanbury the younger and Margaret Hanbury should by deed jointly appoint, and in default of such appointment as the survivors should by deed, will, or codicil appoint, and in default of such appointment in trust for all the children of the marriage as therein mentioned. This indenture contained covenants by Samuel Hanbury the younger for payment of the rent, right to demise quiet enjoyment, and further assurance. The consent of the superior or immediate landlord was not obtained for this settlement.

*Poole*, for the plaintiffs.

*Serjeant Matheson K.C.*, for the defendant Samuel Barrett Hanbury:—

The joint effect of the fair rent order and the purchase of the reversion in fee by Margaret Hanbury swept away the term of 100 years, and consequently the estate so acquired enured for the benefit of the settlement.

*Macrory*, for the defendant Margaret Hanbury:—

This is a statutory graft under the Purchase of Land (Ireland) Act, 1885, sect. 8, and the Land Law (Ireland) Act, 1887, sect. 14, sub-s. 3, and makes the interest purchased a graft on the interest represented by the tenant or person in occupation purchasing. Margaret Hanbury was in occupation under the settlement. Her possession was the possession of the trustees of the settlement, and the fee simple is therefore a graft on the interest thereby settled. Jane Carlos Robinson represents the interest of the grantor of the sub-term created by the settlement. A grantor of a sub-term and the grantee do not stand in such a fiduciary relationship as will give the grantor any interest in a lease or other estate obtained by the sub-grantee from the owner of the fee simple: *Maunsell* v. *O'Brien* (1) under the doctrine of graft.

(1) 1 Jones Exc. 176.

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*M'Gusty K.C.*, for the defendant Jane Carlos Robinson (a daughter of the first marriage of Samuel Hanbury the younger):

The sub-lease of May 1st, 1853, from Samuel Hanbury the elder to Samuel Hanbury the younger operated in law as an assignment of the original lease from Lady Dufferin. Samuel Hanbury the younger was, therefore, in possession of these lands as assignee of a freehold lease at the date of the marriage settlement of 1874. This lease contained a covenant against subletting. The settlement of 1874 was, therefore, void in law, as it purported to sub-demise these lands for 100 years, provided the lives in the original lease should so long live. Sect. 11 of the Land Act of 1896 does not validate this as against the lessors: *Barton* v. *Muldoon* (1). Samuel Hanbury the younger must, therefore, have fixed the fair rent as assignee of the freehold lease. No doubt the statutory tenancy so acquired is bound to feed the settlement: *O'Connor* v. *Foley* (2), but only to the extent of the interest settled which has now expired. The settlement was expressly framed not to catch the freehold estate of Samuel Hanbury the younger. There is no equity to enlarge the interest settled. The covenant for further assurance is to cure a defect in title, not to enlarge the estate conveyed. The doctrine of graft does not apply, unless Samuel Hanbury the younger fixed the fair rent as limited owner under the settlement.

O'CONNOR M.R.:—

In this matter the question for decision is whether certain lands known as Ginnett's Great, situate in the county of Meath, and now held under a vesting order of the Irish Land Commission, are subject to the trusts of a settlement, dated 13th October, 1874, executed on the marriage of Samuel Hanbury the younger with Margaret Hanbury. [His Honor stated the facts above set out, and proceeded:—]

There was issue of the said marriage four children, and no more, viz., Louisa Hanbury, who is one of the plaintiffs in this matter; Samuel Barrett Hanbury, who is one of the defendants, and is his father's heir-at-law, Catherine Sophia Booker Hanbury, and Robert Herbert Hanbury, who died on the 28th February, 1880, an infant.

(1) [1902] 1 I. R. 410. (2) [1905] 1 I. R. 1; [1906] 1 I. R. 2.

Now, pausing for a moment and paying attention to the settlement, it is plain that its object and intent was to put in settlement the whole interest of the sub-lessee in the lands. No doubt, the form of the settlement was that of a sub-lease for ninety-nine years, but that in substance gave the whole interest therein to the trustees, because in the normal course that term would exhaust the estate of the lessee.

Let us now consider what was the interest of Samuel Hanbury the younger under the settlement. Assuming that the settlement was valid, notwithstanding the clause against alienation, he was in equity tenant for life in occupation of the lands. Assuming that it was not valid, he was legal tenant in occupation under the sub-lease, but bound by his covenant for further assurance contained in the settlement to give effect to it any time he was in a position to do so: *O'Connor* v. *Foley* (1).

This being the legal position of Samuel Hanbury the younger, he served a notice on the superior landlord to have a fair rent fixed on the lands of Ginnett's Great on the 30th October, 1888. This notice was served under the provisions of the 1st section of the Land Law (Ireland) Act, 1887, which gave a leaseholder the right to have a fair rent fixed. This right depended upon his being the tenant in occupation. If the settlement was absolutely void, he was in occupation under the sub-lease of the 1st May, 1853; but I am inclined to the opinion that in equity, having regard to the covenant for further assurance in the settlement, he was bound to hold the lands upon the trusts of the settlement, so far as they could be given effect to without violating the covenant against subletting. It is not, however, necessary to decide this question.

The service of the notice to fix a fair rent was a step taken by Samuel Hanbury the younger, which, if followed up by him, would have materially affected the rights of the parties claiming under the settlement. The fixing of a fair rent may not to all intents and purposes put an end to the tenant's leasehold estate, but it undoubtedly affects it and every interest which could be carved out of it. In the present case the right of the trustees of the settlement to compel Samuel Hanbury the younger to demise

(1) [1905] 1 I. R. 1; [1906] 1 I. R. 2.

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to them a term of 100 years as soon as he should be in a position to do so for the lives contained in the sub-lease, and subject only to the rent thereby reserved and the conditions therein, would certainly be affected, because the fixing of a fair rent would impose the consequent statutory conditions and liabilities. He would cease to have the estate which he had settled or had at least covenanted to settle. In lieu of it he would get a new estate which he would be bound in equity to settle, so far as he could, according to the true intent and meaning of the settlement. The new interest which he sought to acquire would be bound by the equities which affected the lease.

Samuel Hanbury the younger died intestate on the 10th October, 1889, before a fair rent was fixed. That being so, the lease was still in existence, and as the estate thereby demised was held for lives limited to the lessee, his heirs, executors, administrators, and assigns, it devolved upon his heir-at-law as special occupant. On the 2nd November, 1889, an order fixing the fair rent was made by the Irish Land Commission. This apparently was done in ignorance of the death of Samuel Hanbury the younger; but all parties seem to have acquiesced in it.

Margaret Hanbury went into possession of the lands on the death of Samuel Hanbury, and that possession must be referred to her equitable title under the settlement, because she had no other title. She procured a grant of letters of administration to his estate on the 21st August, 1890; but that, as I have pointed out, gave her no further title to possession, because the leasehold estate had devolved upon the heir-at-law. She continued to remain in possession of the lands; and then there was passed the Land Act, 1896, the 11th section of which validated the sub-demise of the term of 100 years made by the settlement. Thenceforth the legal tenancy in the lands, carrying with it the right to occupation, was vested in the trustees of the term, who allowed Margaret Hanbury to occupy them, as she was in equity entitled to the profits.

Subsequently, in the month of January, 1905, Margaret Hanbury, being then in actual occupation of the lands, and having no title thereto, save as equitable tenant for life under the settlement, entered into an agreement with the lessors for the

purchase of the fee simple under the Land Purchase Acts. That agreement was followed by a vesting order, made by the Irish Land Commission, dated the 1st June, 1908, whereby the fee simple of the lands was vested in her; and she was afterwards registered as owner in fee simple, subject to equities, on the 12th November, 1908.

Now, the estate so acquired by her was a graft upon the previous interest of the tenant, which was none other than the term of 100 years demised by the settlement. The graft must, therefore, enure for the benefit of the settlement.

This is the way the case presents itself to my mind; but I am bound to say that I was much impressed by the able argument of Mr. M'Gusty, who contended that there was no enlargement of the term of 100 years. He presented the very plausible view that it was not the lease which was put in settlement, but only a particular interest carved out of it, viz., the term of 100 years; and that the parties claiming under the settlement had no right to any further interest. As I understood Mr. M'Gusty's argument, the case should be treated as if Samuel Hanbury the younger had during his life in the ordinary course purchased the reversion in fee expectant upon the lease. The estate so purchased would be subject to the term of 100 years, defeasible on the dropping of certain lives, but to no further estate. It may be allowed that this would be the result in such a case; but there is an essential difference in the case of a purchase under the Land Purchase Acts, which gives the right to the person in occupation. Margaret Hanbury and her trustees were the occupiers by virtue of the settlement, and it follows that the new interest acquired by her was for the benefit of all parties entitled under the settlement.

Further, I am not at all disposed to adopt the view that it was only a particular estate carved out of the leaseholder's interest which was put in settlement. As I have already pointed out, although the conveyance took the form of a demise of a term, it was in substance an assignment of the whole beneficial interest in the lease. Mr. M'Gusty had to admit that if the lease itself had been the subject of the settlement, the acquired fee would also become subject to it. We are dealing now with an equitable doctrine, and as equity regards substance rather than form, a

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purely conveyancing distinction ought not to prevent the application of the doctrine of graft.

I have gone fully into the whole case as argued by learned counsel on both sides, but it seems to me that I could have rather summarily disposed of it. I have called attention to the fact that the lease was limited to the heirs, executors, administrators, and assigns of the lessee. The chattel interest had gone before Samuel Hanbury's death. It was only the freehold estate that remained. The fair-rent order had not been made before his death, so that, no matter what the effect of the fixing of a fair rent may be on a leasehold estate, the lease devolved upon the heir-at-law as special occupant. Mr. M'Gusty's client was only a next-of-kin, being a daughter of a former marriage, and had therefore no interest whatever in the lease. As between the children of the second marriage, in consideration of which the settlement was executed, there was no dispute.

Solicitor for the plaintiffs: *Weldon C. Molony.*

Solicitor for the defendant Samuel Barrett Hanbury: *W. C. Meeke.*

Solicitor for the defendant Margaret Hanbury: *Weldon C. Molony.*

Solicitors for the defendant Jane Carlos Robinson: *Hayes and Son.*

R. R.

## IN RE CORCORAN'S SETTLED ESTATES.

(1919. No. 307.)

*Powell J.*
1919.
May 6.

*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 18—"*Enfranchisement*"—*Yearly tenancy—Mortgage for purpose of purchasing fee.*

"Enfranchisement" in s. 18 of the Settled Land Act, 1882, includes the purchase of the reversion in fee of settled lands held on a yearly tenancy.

SUMMONS.

Under an indenture, dated 16th April, 1907, certain lands then held on a yearly tenancy were settled upon trusts under which the applicants were tenant for life in possession and tenant for life in remainder respectively. In 1912 a fair rent was fixed by agreement on the said lands. The applicants subsequently agreed with the landlord for the purchase by them under the Land Purchase Acts of the fee simple in the said lands; for the purpose of carrying out that purchase it was necessary that £1200 should be lodged with the Land Commission. The application was for an order approving of the said purchase and for liberty to raise £1200 by mortgage of the settled lands for the purpose of completing it.

*Walker K.C.*, for the applicants:—

In *Halsey* v. *Bruce* (1), it was held that "enfranchisement" in sect. 18 of the Settled Land Act, 1882, includes the purchase of the reversion of settled leasehold land. A tenancy from year to year is properly described as leasehold: *Gandy* v. *Jubber* (2); *Cattley* v. *Arnold* (3); *Birch* v. *Wright* (4); *Wright* v. *Tracey* (5). Under the Settled Land Act, 1882, sect. 21, sub-s. 6, capital moneys arising under the Act may be applied in purchase of the reversion of settled leasehold land.

*Smylie*, for the trustees.

His Lordship made the order applied for.

Solicitors for the applicants: *Molloy & Fayle.*
Solicitors for the trustees: *W. C. Hogan & Sons.*

M. C. E.

(1) [1905] 2 Ch. 372.
(2) 9 B. & S., at p. 18.
(3) 1 J. & H. 651.
(4) 1 Term Rep., at p. 380.
(5) I. R. 8 C. L. 478.

*Powell J.*
1919.
March 6, 7.
May 1.

## IN RE BONYNGE, DECEASED.
## FINUCANE *v.* DALY.

(1919. No. 28.)

*Will—Estate in realty—Devise to heirs in priority of birth—Gift over on death without issue—Estate in fee—Estate tail.*

A testator made a bequest of his lands to his child M. L. B as follows:—"My estates . . . I leave to the child . . . and to the heirs of said child, the male taking before the female according to priority of birth and seniority of age, and to their heirs for ever . . . Now, in case the said child should not live or in the event of its death without issue, I leave the whole of my property . . . between my cousins . . ."

*Held*, that M. L. B. took an estate in fee simple in the lands, with an executory limitation over to the testator's cousins.

ORIGINATING SUMMONS.

John North Bonynge made his will, dated 7th June, 1854, as follows:—"My estates in the counties of Longford and Westmeath, together with the money vested to my credit in 3¼ Government Stock by the Wide Street Commissioners and Midland Western Railway under the Lands Clauses Consolidation Act, I leave to the child, whether it be male or female, of which my wife is now pregnant, and to the heirs of said child, the male taking before the female, according to priority of birth and seniority of age, and to their heirs for ever . . . . Now, in case the said child should not live, or in the event of its death without issue, I leave the whole of my property, freehold and personal, share and share alike, between my cousins, Bessy Finucane, Kitty Finucane, and Pierse Finucane."

The testator died on the 25th May, 1863, without having revoked or altered his will. Letters of administration were on the 2nd July, 1863, granted to Margaret Louisa Bonynge, widow of the testator, limited in duration until the decease without issue of Margaret Louisa Bonynge, the daughter of the testator. The testator left him surviving his widow, Margaret Louisa Bonynge,

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and a daughter, also named Margaret Louisa Bonynge, who was the unborn child referred to in the will; and the testator was at the date of his death seised for an estate in fee simple in possession of lands in the counties of Longford and Westmeath.

By an indenture, dated the 20th July, 1875, Margaret Louisa Bonynge, the daughter of the testator, purported to bar an estate tail which she claimed to have in all the lands which passed under the will.

By an indenture, dated the 7th October, 1889, being the settlement executed in contemplation of the marriage intended and shortly afterwards solemnized between B. P. Creagh and Margaret Louisa Bonynge, the daughter of the testator, the said Margaret L. Bonynge conveyed the said lands in trust for Margaret L. Bonynge during her life, and after her death for B. P. Creagh during his life, and after the death of the survivor in the event of there being no issue of the marriage, upon trust for such persons as Margaret L. Bonynge should by deed or will appoint, and in default of such appointment upon trust for the said Margaret L. Bonynge, her heirs, and assigns. There was no issue of the marriage of Margaret L. Bonynge and B. P. Creagh.

B. P. Creagh died on the 15th March, 1905. Margaret L. Bonynge, otherwise Creagh, died on the 18th September, 1917, intestate, without ever having had any issue, and without having exercised the power of appointment purported to have been given to her by the settlement of the 7th October, 1889. The plaintiff, Pierse Finucane, a devisee named in the will of the testator, brought the present summons for the determination of the following question:—"On the true construction of the will of John North Bonynge, and in the events which have happened, has the contingent devise contained in the will of the whole of the testator's property, freehold and personal, to his cousins, Bessy Finucane, Kitty Finucane, and Pierse Finucane, taken effect in respect of the testator's lands in Longford and Westmeath?

The defendant, Archdeacon Daly, was one of the trustees of the before-mentioned marriage settlement. At the hearing an order was made appointing the defendant to represent the heir-at-law of the late Margaret L. Bonynge, otherwise Creagh.

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*Serjeant Matheson K.C.* (with him *A. Matheson*), for the plaintiff:—

On the true construction of the will, and in the events which have happened, Margaret L. Creagh, the unborn child mentioned in the will, took under the will an estate in fee simple in the lands with an executory limitation over to the testator's cousins named in the will. The word "heirs" in this will is a word of limitation and not of purchase. The rule in *Shelley's Case* (1) applies: Theobald on Wills, p. 418; *Fetherston* v. *Fetherston* (2); *Alpass* v. *Watkins* (3). The words "die without issue" mean a failure of issue during the lifetime: sect. 29 of the Wills Act (1 Vict. c. 26): *In re Chinnery's Estate* (4).

*G. W. Walker K.C.* (with him *R. D. Orr*), for the defendant:—

Under the gift in the will the unborn child took an estate tail in the lands. The gift over, in the event, which happened, of her death without issue, has been defeated by the operation of the disentailing deed. Sect. 29 of the Wills Act would prevent me arguing for an estate tail; but the section prevails only where a contrary intention does not appear by the will. I agree that the rule in *Shelley's Case* (1) applies: *Foxwell* v. *Van Grutten* (5); but that leaves open the question whether the estate is an estate in fee simple in the first taker, or an estate in tail male, or in tail general, as the case may be. The estate given is not a mere life estate in the first taker; therefore, a fortiori, it is a case for the application of the rule. The word "heirs" in this will means heirs of the body. The intention of the testator was that the estate was to travel down a course of devolution like that of an estate tail or tail male. The words "according to priority of birth and seniority of age" are words appropriate to an estate tail. The gift over to a person who might be heir general of the first taker shows that "heirs" means heirs of the body: *Watkins* v. *Frederick* (6); *Palmer* v. *Palmer* (7); *Studdert* v. *Von Steiglitz* (8);

(1) 1 Rep. 93 *b*.
(2) 3 Cl. & F. 67.
(3) 8 Term. Rep. 516.
(4) 1 L. R. Ir. 296.
(5) [1897] A. C. 658.
(6) 11 H. L. C. 358.
(7) 16 L. R. Ir. 357; 18 L. R. Ir. 192.
(8) 23 L. R. Ir. 564.

*In re Pennefather, Savile* v. *Savile* (1); *Earl of Tyrone* v. *Marquis of Waterford* (2); *Waugh* v. *Cripps* (3). The words "in default of issue" mean prima facie in default of heirs of the body: *Kavanagh* v. *Morland* (4); *Roddy* v. *FitzGerald* (5).

*R. D. Orr*:—

The words used in *In re Pennefather, Savile* v. *Savile* (1) are identical with the words used in the present will. The words here, "in priority," &c., are not applicable to an estate in fee.

*A. Matheson*, in reply:—

Admittedly the rule in *Shelley's Case* (6) applies. Therefore there is here a gift to one person only, and no gift to the heirs. The words following "male taking before the female" are mere surplusage, and do not prevent the word "heirs" being still only a word of limitation. In most of the cases cited on the other side the gift was to persons in succession. The gift here is, if the first taker die without issue, over; but the donee of the gift over is not one of the issue. The gift over is not "if B shall die without heirs," in which case it might be necessary to give an estate tail.

*Cur. adv. vult.*

May 1.

POWELL J.:—

This is an application on the part of the plaintiff, Pierce Finucane, who claims to be the devisee in remainder named in the will, dated 7th June, 1854, of one John North Bonynge, and also heir-at-law of one Catherine, otherwise Kitty Finucane, and Elizabeth, otherwise Bessie Finucane, who are alleged to be respectively devisees in remainder under the will, for the determination of questions arising on the construction of the will.

The plaintiff asked for an order that the defendant be appointed to represent the heir-at-law of the late Mrs. Margaret Louisa Creagh, otherwise Bonynge, who was a daughter of the testator, and I made this order.

(1) [1896] 1 I. R. 249.
(2) 1 D. F. & J. 613.
(3) [1903] 1 Ch. 744.
(4) Kay, 16.
(5) 6 H. L. C. 823.
(6) 1 Rep. 93 *b*.

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Serjeant Matheson, who appeared for the plaintiff, and Mr. Garrett Walker, who appeared for the defendant as representing the heir-at-law of Mrs. M. L. Bonynge, both say that the rule in *Shelley's Case* (1) applies.

Serjeant Matheson contended that Mrs. Bonynge took an estate in fee simple subject to an executory gift over in the events which have happened, and that therefore the plaintiff is entitled. Mr. Walker admits that she took a freehold estate, but contends that on the true construction of the words of the will the estate was an estate tail male followed by an estate in tail general, and that the entail having been barred the heir-at-law is entitled.

In support of this contention he relies in the first place on the words in the will, "the male taking before the female according to priority of birth, seniority of age, and to their heirs for ever." He says that by virtue of these words the estate goes through a series of successions and priorities, and that, therefore, the word "heirs" must be read "heirs of the body," because if the word "heirs" is not to be so read, the will would purport to create a succession of estates in fee simple, which is unknown to the law, but that by construing the word "heirs" as "heirs of the body" effect can be given to the words, by the only mode of creating estates in fee simple in succession, namely, an estate tail, and that the intention manifested in the will was that the estate was to travel down in course of devolution as in tail general. He also contends that "heirs" in the will cannot be heirs general, because then the gift over in the event of failure of heirs general would be a gift to persons who might be heirs. It was not disputed by Serjeant Matheson that his client might be an heir of the deceased. Mr. Walker relies on the words in the gift over in the will, "now in case the said child should not live or in the event of its death without issue, then over." He says that, prima facie, the word "issue" means heirs of the body, and that I should so construe it in this will; that I should not apply to it the construction given by sect. 29 of the Wills Act, because there is a contrary intention apparent on the face of the will that the unborn child should take a prior estate tail. He says

(1) 1 Rep. 93*b*.

that if I construe "heirs" as heirs of the body, and "issue" as heirs of the body, there is a co-ordinate gift and a correlative gift over, that is, a gift to heirs of the body and a gift over in default of heirs of the body; that, on the other hand, if I construe the words as heirs general, there is a gift over, not correlative and not co-ordinate to the original gift; and further, a gift to heirs general and a gift over to a possible heir.

In *Towns* v. *Wentworth* (1) Lord Kingsdown laid down the rule as to the construction of wills, in referring to which Sir Edward Sullivan in *Fay* v. *Fay* (2), at p. 280, said:—"I have read nowhere so good an enunciation of the law." Lord Kingsdown says: "In order to determine the meaning of a will the Court must read the language of the testator in the sense which it appears he himself attached to the expression which he has used, with this qualification: that when a rule of law has fixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has by his will excluded beyond all doubt such construction. When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be disregarded or modified. On the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court has to supply the defect by amplification, and thus to mould the language of the testator so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared."

The first matter I have to determine is whether I should construe the word "heirs of said child" in the first gift as heirs general or as heirs of the body. I have to ask myself: Do the words following the gift, "the male taking before the female according to priority of birth and seniority of age and to their heirs for ever," affect the construction of the word "heirs" in the gift? The authorities cited by Mr. Walker and many authorities

(1) 11 Moo. P. C. C. 526. (2) 5 L. R. Ir. 274.

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of a similar kind show that where the intention of the testator is clear that persons are to take in succession estates of inheritance; and the only way in which they can so take them is by giving them successively estates tail, the rule of law is that the word "heirs" is to be taken in the largest possible sense, and the limitations may be modified to carry the intention into effect, and in such a case "heirs" may be read as heirs of the body.

Mr. Walker relied on the decision of Vice-Chancellor Chatterton in *Studdert* v. *Von Steiglitz* (1), and the cases referred to by him. The facts in that case sufficiently appear from the judgment of the Vice-Chancellor. Colonel William Blacker was at the respective times of making his will and of his death seised in fee of certain lands called the Carrick Estate, and seised as of freehold of certain other lands called the Strangford Estate. By his will, dated 24th May, 1854, he devised the Carrick estate as follows: "To his nephew, Stewart Blacker, and after him to his heirs male, and in failure of such heirs male to his nephew, James C. Blacker, with remainder to his heirs male lawfully begotten, and in failure of heirs male on the part of those his nephew aforesaid he left the estate to the sons in succession of his eldest sister, Letitia Studdert." He then devised his property in Strangford to his wife for life, and at her decease to his nephew, Stewart Blacker, as aforesaid; and should he die without male issue, he left his property to the sons of his sister, Letitia Studdert, as above mentioned, they taking in both these cases the name "Blacker." He bequeathed certain chattels personal as an heirloom to his nephew, Stewart Blacker, and his heirs as above mentioned. The will did not contain any other devise of real estate. Stewart Blacker and James Blacker both died without having been married. Letitia Studdert had four sons, two of whom died in the lifetime of the testator. The other two, Abraham and George, survived the testator, George, the youngest son, being the plaintiff in the action. Abraham had two sons, George William and Thomas Frederick, both of whom survived him. George William died without issue and intestate, leaving his brother, Thomas Frederick, his heir-at-law. By enrolled deed of the 16th April, 1883, Thomas Frederick Studdert conveyed to the defendant, Stewart Blacker, called the fourth, the Strangford

(1) 23 L. R. Ir. 564.

estate. The plaintiff contended that the sons of Letitia Studdert took these lands either as joint tenants in fee or as successive tenants for life, and that on the death of his brother Abraham he became in either case entitled in possession to the estate. The defendant, Stewart Blacker, contended that those sons took successive estates tail, and that he was entitled in fee or quasi fee as the grantee of Thomas F. Studdert, who was tenant in tail, or quasi tail, of the lands. The Vice-Chancellor decided two questions on the particular language of that will: first, that the sons of Letitia Studdert were given devises in succession, and not in joint tenancy; and, secondly, that these successive estates were not for life; that the testator supposed he could give each of the four sons the estate in fee, one after the other; that the general intention of the will was that after providing the prior estates for his nephews both properties should be brought and kept together in one son of his eldest sister, and his descendants, who were to take the name of Blacker; that the testator was not likely to know how to limit an estate tail, and he therefore used words which could only be given effect to cy près. He said that in a case like the one he was dealing with if the Court considered that a general intention to continue the estate as an inheritance in the testator's family sufficiently appeared, it could mould estates expressed to be given in fee which could not take effect consistently with the rules of law into the species of estate next approaching a fee that could take effect, and that as the only estate of inheritance besides a fee is an estate tail it would construe a devise which purported to give successive estates in fee simple into successive estates in tail. He said the only other construction would be to give estates for life only, as the plaintiff had contended, that this construction had nothing in principle to commend it, and asked why should the Court prefer to cut down an estate in fee to a life estate instead of to a gift of estates tail. There would be an entire sacrifice of the general intention of the testator.

He then proceeds to review a great number of authorities, and he says he has endeavoured from them to deduce the true principle of construction applicable to the will before him, which he considered to be that where there is a devise to several in

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succession in words sufficient to pass the fee or the whole interest of the testator in freeholds the Court would, in order to give effect to the general intent, construe the gift as of successive estates in tail, that this general intent must be ascertained from the whole will, and that a name clause, such as was found in that will, must be taken as an important element in ascertaining this intent. He was of opinion that such general intent sufficiently appeared in the will, and that the two surviving sons of Abraham Studdert took successive estates in tail, or quasi tail, in the Strangford estates as purchasers.

The learned Vice-Chancellor in his judgment relied strongly on the case of *Ginger d. White* v. *White* (1), where the devise was to John White for life, and from his decease to the male children of John successively as in priority of age and to their heirs, and in case John should die without issue, then over. Willes C.J. said that he thought the testator's meaning was as plain as possible, that John should only have an estate for life, that the children of John should have an estate in tail general, and that in default of such issue the premises should go over. He then went into elaborate reasons to show what the general intention of the testator was, laying stress on the use of the word "successively." The Vice-Chancellor thought this case was much in point, as the devise was in express terms to the male children of John successively and their heirs, and as this devise could not take effect successively the estates given were construed to be estates tail. He stated his opinion that the intention of the testator was clear that sons were to take successive estates of inheritance, and that the only way in which they could so take was by giving them successive estates in tail general. He also referred to the language of Lord Westbury, Lord Chancellor, in the case of *Watkins* v. *Frederick* (2), where he said that the grandsons take estates tail follows of necessity from the direction that they shall take in succession one after another, the elder sons to inherit before the younger.

In *re Pennefather, Savile* v. *Savile* (3) was also much relied on by Mr. Walker and Mr. Orr. The testatrix left and bequeathed all the property, whether in lands or otherwise, which she might be

(1) Willes, 348. (2) 11 H. L. Cas. 366. (3) [1896] 1 I. R. 249.

possessed of to trustees, their heirs, and assigns in trust (after a life estate to her mother, who predeceased her) to the use of her nephew William Savile for his life use, and then to his "children" in priority in case he marries, the sons to inherit before the daughters, but in case the said William Savile should die unmarried for the use of his cousin Mary, her heirs and assigns for ever. William Savile married and had a son John Savile and a daughter Beatrice. It was held by the Master of the Rolls that William Savile took an estate for life in the real and personal estate of the testator, and that John Savile took an estate tail in the realty, and an absolute interest in the personalty, subject to the life estate of his father William Savile, and that Beatrice Savile was entitled to an estate tail in remainder in the real estate after the estate tail of John with an ultimate remainder to the right heirs of the testator. The Master of the Rolls reviewed all the authorities cited and many more, and he held (*a*) that none of the cases compelled him to hold that the expressed intention of giving a life use to William should be frustrated and the property placed at the disposal of the first taker, and that the children took in priority, and that on the principle of *Earl of Tyrone* v. *Marquis of Waterford* (1) they took successive estates tail, and he said that the terms of the gift over, the use of the words in priority, and above all the plain and manifold intention that as long as there were descendants of the plaintiff they should all be provided for, left no doubt in his mind that the children took successive estates tail if they took as purchasers, and that the life estate to the father with the use of the words "sons and daughters" as explanatory of children, showed that they did take as purchasers. He added that he entirely agreed with the Vice-Chancellor in what he said in *Studdert* v. *Von Steiglitz* (2), that "where there is a devise to several in succession in words sufficient to pass the fee or the whole interest of the testator in freeholds the Court will, in order to give effect to the general intent, construe the gift as of successive estates in tail."

I do not think, with great respect, that these cases apply. I do not think that there is in this will a devise to several in succession. As to this part of the case I agree with the contention

(1) 1 D. F. & J. 613. (2) 23 L. R. Ir. 564.

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of Mr. Arthur Matheson. I think that the gift here is to the child, and to the heirs of the child; that the words "heirs of said child" define the estate given to the child, and that the estate given to the child is an estate in fee simple; and that the words "the male taking before the female, according to priority of birth and seniority of age, and to their heirs for ever," constitute merely what the person who drew the will believed to be the devolution of a fee simple estate, that they do not import a plain and manifest general intention of the testator that so long as there were descendants of the child they should all be provided for, in other words, that the estate is to be transmissible to lineal descendants only. I do not think that the words relied on confine the devolution of the estate to the lineal heirs or descendants of the child.

Even if the testator intended the heirs (general) to take in a manner in which as such they could not take, that does not mean that persons other than heirs general were meant to be the objects, and unless such words are to be treated as explanatory of the testator's intention to use the term "heirs" in some other sense—and I do not think that the words in question should be so treated—then I think—the authorities are clear—that they are to be rejected as repugnant to the estate which those words properly and technically create. In *Hennessy* v. *Bray* (1), and cases of that description, the Court read "heirs" as "heirs of the body," for the purpose of giving effect to a plainly expressed intention in the will that sons or children were to take in succession estates of inheritance, and the only way in which they could so take was by giving them successively estates tail. I can find no such intention in this will. Nor does the gift in this case, I think, resemble the gift in *Lord Tyrone* v. *Lord Waterford* (2), where, as pointed out by Lord Selborne in *Bowen* v. *Lewis* (3), the gift was "to my brother John Beresford and to his children in succession," where no definite estate was limited, either to the parent or any child, and where "succession" (the only thing expressed) might be best accomplished through an estate tail in the father, under which every child in turn might take the inheritance.

(1) 33 Beav. 96. (2) 1 D. F. & J. 613. (3) 9 App. Cas. 890.

It is to be observed that in the codicil of the 3rd July, 1862, when the deceased is dealing with the lands of Attysleavy, acquired by the testator after the date of his will, the gift after his wife's death is to his daughter Louisa, who was the child unborn at the date of the will, and to her heirs for ever, and in case of her not having issue, to her cousins Bessie, Kitty, and Pierce Finucane. There are no superadded words, and on the question of general intention it is difficult to suppose that the testator intended a different devolution in respect of the lands dealt with in the will from that of the lands dealt with in the codicil.

So far, therefore, as the argument of Mr. Walker, that I should construe "heirs" in the gift as "heirs of the body," is grounded on the existence of the superadded words in the will, with great respect, I disagree with it.

Then is the child's estate in fee cut down to an estate tail by reason of the words of the gift over, "in the event of its death without issue"? If there is a devise to A which gives A the fee either by express limitation or by construction, followed by a gift over if he dies without "heirs" of the body or "issue," if these words import an indefinite failure of issue, A's estate is cut down to an estate tail. If, however, the failure of issue is not an indefinite failure of issue, there is no necessity for this construction, and the gift over will take effect as an executory devise: Theobald, 7th ed., 407. In *Doe d. King* v. *Frost* (1), which was decided before the Wills Act, and in which the words of the will were:—"I give to my son, William Frost, and his heirs for ever all my houses and lands," &c., and if the said William Frost should have no children, child, or issue, the said estate was on the decease of the said William Frost to become the property of the heir-at-law, subject to such legacies as he may leave by will to any of the younger branches of the family, it was held that William Frost took under the will an estate in fee, with an executory devise over to the person who on the happening of the event contemplated by the will should become the heir-at-law of the testator. Bayley J. says: "If the Court see by the whole frame of the will that the estate is to continue in the first devisee so long as he has any

(1) 3 B. & Ald. 546.

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lineal descendant, it will follow that the gift to him is of an estate tail, but if the will gives it to him in fee, there may be then an executory devise on the happening of a particular event. Here the will gives the estates to William Frost and his heirs for ever; and if he had no children, child, or issue, the estate was on his decease to become the property of the heir-at-law. It does not seem to me that this contemplates a devise over on an indefinite failure of issue, but only the failure of issue at the time of William Frost's death." This case seems to me to be an authority also on another branch of Mr. Walker's argument, to which I will refer later on. I cannot say that I see by the whole frame of the will in this case that the estate is to continue in the first devisee so long as he has any lineal descendants. The circumstance that property the subject of a gift over is charged with the payment of any provision made by a testator for his wife has been held to show that the gift over was the thing against which the provision for a wife had to be protected; and it will be observed, in the will under consideration, that the gift over is to be subject to the wife's jointure, and also to a further sum of £60 per year in addition to the jointure, the £60 per year to be a charge on the freehold property, railway shares, &c.

Mr. Walker says that "issue" prima facie means "heirs of the body." Chief Justice Willes has made some observations on this subject in the case already referred to of *Ginger d. White* v. *White* (1). It cannot be said that this case was decided without due deliberation, because it was argued five times; and although the case was first argued in Easter Term, 1737, the judgment was not given till July, 1742. The case was decided, as was pointed out by the Vice-Chancellor in *Studdert* v. *Von Steiglitz* (2), on the particular words of the devise to children successively and their heirs. But the Chief Justice made some observations on what he called the general topic to which I think I ought to refer. He says (at p. 350): "And now I am upon the general topic, before I enter upon the particulars of the present case I beg leave to take notice of one mistake—for so I think it to be—which has occasioned more confusion in respect of the construction of wills than any one thing whatsoever. What I mean is that a notion has prevailed that

(1) Willes, 348. (2) 23 L. R. Ir. 564.

such particular words in a will are as much technical words as others are in a deed, as, for instance, that the words 'issue' or 'children,' where there are none at the time of the devise, do as necessarily create an estate tail in a will as 'heirs of the body' do in a deed. But this I take to be a gross mistake, for why does the word 'issue' in a will signify the same as 'heirs of the body'? Only because it may be supposed that the testator, who was ignorant of the law, intended it should have that construction. It does not, therefore, vi termini create an estate tail in a will as 'heirs of the body' do in a deed, but only where it appears to be the intent of the testator that the word should have that construction, or at least that it does not appear that the intent of the testator was otherwise. In order, therefore, to find out what construction is to be put upon the words of a will, we ought, in the first place, to consider what the intent of the testator is, though this, I am afraid, is too often the last thing that is thought of. But the Court of King's Bench in the case of *Law* v. *Davys* (1) laid so much stress upon this and upon the notion which I have now endeavoured to establish that they determined, upon the first argument, that even the words 'heirs of the body' should not pass an estate tail in a will because it plainly appeared to be the intent of the testator that they should not. Mr. J. Reynolds was pleased to say upon that occasion: 'Shall not a man be allowed to speak his mind in his will? Surely a man ought to be allowed to do so, and yet, if we consider how miserably some wills have been tortured, we may fairly say that this is a privilege that is not always allowed to testators.'"

Sir Edward Sullivan, in *Fay* v. *Fay* (2), said that the true construction of sect. 29 of the Wills Act (1 Vict. c. 26) was that the words "die without issue," or "die without leaving issue," or "have no heirs" should prima facie be taken to mean a want or failure of issue in the lifetime or at the time of the death of such person, unless on the true context of the whole will you are forced to the conclusion that the words referred to an indefinite failure of issue. Mr. Walker says that I am forced to such a conclusion by the superadded words; but if my view of the earlier branch of the case be correct, I cannot, of course, yield to this contention.

(1) FitzG. 112.

(2) 5 L. R. Ir. 274.

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There remains the further contention of Mr. Walker that "heirs" cannot mean "heirs general," because the gift over is to a possible heir. He relied upon the case of *In re Waugh, Waugh* v. *Cripps* (1). In that case, Edward Waugh, by his will dated December 30th, 1862, after divers bequests and devises, gave the residue of his real and personal estate to his wife, Deborah Waugh. By a codicil dated August 13th, 1886, the testator, after divers specific devises, gave the two cottages—Nos. 9 and 12 in Chapel Street, Sheerness—to his daughter, Catherine Graham, "after her death: No. 12 to go to her youngest daughter, Elizabeth Graham, and her heirs; and No. 9 to go to her son, William Graham, and his heirs. If either the said Elizabeth or William should die without an heir, their share is to go to the survivor's heir or heirs." Elizabeth Graham died in 1891, a spinster and intestate; and William Graham died in 1897, a bachelor, but leaving a will whereby he devised a moiety of his real estates to the defendant, Annie Cripps, the wife of the defendant, W. Cripps; and the other moiety he devised to a person under whose will it is now vested in the defendant, W. Cripps. The defendant, Annie Cripps, was also one of the co-heiresses-at-law of William Graham. Catherine Graham, the life tenant of the two cottages, died in April, 1902. It was held by Mr. Justice Farwell (afterwards Lord Justice Farwell) that Elizabeth Graham and William Graham took estates in tail in the cottages devised to them respectively, and that the gift over to the survivor's heir or heirs was a gift to the heirs general of the survivor and a contingent remainder which took effect as to the cottage devised to Elizabeth Graham in tail. Farwell J. relied upon the general rule of construction, as stated in Fearne on Contingent Remainders, 10th ed., vol. i, p. 466—"But we are to remember, however, that although a devise over after a dying without heirs is in general void, yet this rule is not without exceptions; for if the person to whom the limitation over is made be a relation of and capable of being collateral heir of the first devisee, in that case the first devisee takes only an estate tail." Farwell J. says: "The result is merely a rule of construction and not a rule of law, and it has been established to give effect to the intention for reasons applicable to the present

(1) [1903] 1 Ch. 744.

case. The gift over assumes the existence of the one at the death of the other, and the title of the heirs of the survivor is contingent on evidence of survivorship of their ancestor. If it is absurd to suppose that the testator meant heirs general in a gift to A. and his heirs because he has given the property over in the event of failure of heirs general to a person who may be such heir general, it is equally absurd to suppose that he meant heirs general when the gift over to a stranger is made to depend on the existence of one who is or may be heir general at or after the total failure of heirs general." He points out on the second branch of the case that the word "heirs" is not a flexible word like "issue," which was the word in *In re Birks* (1), in which Lindley M.R. says: "Although it is true that among lawyers issue is generally taken to mean descendants, we must not allow ourselves to be misled by that. We must not start with any predisposition to read the word in that way, but we must look at the will and try and see whether the testator has shown what he meant when he used the word." There is no hard and fast rule, he says, and what we have to discover is the sense in which this testator has used the word in this will.

Applying that to the words of the gift over in the present case, "now, in case the said child should not live, or in the event of its death without issue" (not "without an heir"), I do not think that the decision in *Waugh* v. *Cripps* (2) on the first branch governs this case. There the gift over was to a survivor's heir or heirs in the event of death without an heir. Here the devise over is to a person who might be an heir, but who could not be "issue."

A great number of cases may be cited to show that, before the Wills Act, where an estate is limited to a man and his heirs for ever, and if he die without "leaving heirs" then to any person who may be his heir, those words shall not have their full legal operation, but shall be restrained to heirs of a particular kind, namely, heirs of the body; but even then the words would yield to an intention to use them in the restricted sense. In *Roe d. Sheers* v. *Jeffery* (3), one Goodacre, being seized in fee of the premises in question, by will, dated 20th May, 1754, devised

(1) [1900] 1 Ch. 417. (2) [1903] 1 Ch. 744. (3) 7 T.R. 589.

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to his wife, A. Goodacre, for life; and after her decease to his daughter, Mary Friswell, wife of W. Friswell, for life; and after her death to his grandson, T. Friswell; and to his heirs for ever; but in case his said grandson should depart this life and "leave no issue," then his will was that the dwelling-house, &c., should go and return to Elizabeth, Mary, and Sarah, the three daughters of W. and M. Friswell, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike. Elizabeth, Mary, and Sarah were sisters of the grandson. The devise to Elizabeth, Mary, and Sarah was held to be a good executory devise. Lord Kenyon, in giving judgment, said that the question in this and similar cases was, whether upon the whole context of the will we can collect that when an estate is given to A and his heirs for ever, but, if he die without issue, then over, the testator meant dying without issue living at the death of the first taker. He said that the rule was settled so long ago as in the reign of James I in a case of *Pells* v. *Brown* (1), where the devise being to Thomas, the second son of the devisor, and of his heirs for ever, and if he died without issue living, then his son, William, should have those lands to him and his heirs for ever, the limitation over was a good executory devise. That case had never been questioned or shaken, but had been adverted to as an authority in every subsequent case respecting executory devises. It was considered as a cardinal point on this head of the law, and could not be departed from without doing as much violence to the established law of the land as it was supposed by the defendant's counsel they should do if they decided this case against him. He said it was impossible not to see that the failure of issue intended by the testator was to be a failure of issue at the death of the first taker, and, if so, the rule of law was not to be controverted. It was merely a question of intention; and they were all clearly of opinion that there is no doubt about the testator's intention.

I have in this case come to the conclusion that the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; and I should be obliged to adopt this construction under the Wills Act, unless I were forced to come to the conclusion that he meant an indefinite failure.

(1) Cro. Jac. 590.

In *Gwynne* v. *Berry* (1) a testator, seised in fee, by his will dated in 1830, devised all his estate in the lands to his sons, James and George, share and share alike; and in case of the death of either unmarried or married and leaving no lawful issue, then over to his son, John. It was held by Morris, Keogh, and Lawson JJ., that James and George took an estate in fee with an executory devise over to John. Morris J. in his judgment said:—"The first devise in the will to James and George respectively is of an estate in fee; and to support the plaintiff's contention this estate must be cut down by subsequent limitation to an estate tail, if the testator has so expressed his intention; but if the estate is to continue in the devisee, so long as he has lineal descendants, it is, of course, an estate tail, while, if the gift over (query) at the death of James or George contemplates merely a failure of issue at the time of their respective deaths, and not an indefinite failure of issue, it operates as an executory devise"; and he refers to the case of *Doe d. King* v. *Frost* (2), to which I have referred. He says he is not aware that any case decides that where there is a clear devise in fee simple given by the first words that estate has been reduced to an estate tail on the death of the devisee without issue.

I have given my views on Mr. Walker's three propositions separately and independently, as I understand him to argue them in that way; but I must say that having regard to my views on the first point, and having regard to sect. 29 of the Wills Act, I think it follows that I should have to decide the other two points against him. Mr. Walker has said that it is a difficult case. I think it is; and I confess the conclusion at which I have arrived is put forward by me with much diffidence, having regard to the extremely able arguments of Mr. Walker. But if I were compelled to come to the opposite conclusion, I should do so with the strong belief that I was not carrying out the intention of the testator; and, furthermore, I should regret having to come to the conclusion that the lands in question belong to no man who can be discovered.

Solicitors for the plaintiff: *Stephen Gordon & Sons.*
Solicitors for the defendant: *Beauchamp & Orr.*

D. M. S.

(1) I. R. 9 C. L. 494. (2) 3 B. & Ald. 546.

*M. R.* 1918.
Dec. 20.
*Appeal.* 1919.
April 30.

## FRANCES ROONEY *v.* THE DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION FOR IRELAND.

(1918. No. 300.)

*Food supply—Maintenance of—Entry on land for purpose of—Lands sublet—Unreasonable withholding—Jurisdiction—Compensation to owner—Defence of the Realm Acts—Regulation 2 L.*

Lands were compulsorily acquired by the defendants for the maintenance of food supply under Regulation 2 L of the Defence of the Realm Act, which lands were at the time sublet in conacre. In an action by the owner of the lands against the defendants for damages and an injunction:

*Held,* by the Court of Appeal (affirming the decision of the Master of the Rolls), that the question whether the use of the lands had been unreasonably withheld was one solely for the opinion of the Department of Agriculture, whose conclusion thereon was not open to review in an action.

*Held,* also, that the omission from the Regulation, as applied to Ireland, of sub-s. 4, providing for compensation on the determination of the occupation to any person injuriously affected by the exercise of the powers under the Regulation does not amount to a statutory rescission of any existing right of compensation vested in such person.

ACTION.

The plaintiff was the registered owner in fee simple of certain lands containing 7 acres 3 roods and 2 perches, and 6 acres 2 roods and 10 perches respectively, situated near Cabra, in the city of Dublin, all of which she had let under conacre lettings for eleven months from the 1st February, 1918, for lairages for sheep and cattle, and for dairying purposes.

The plaintiff by her statement of claim alleged that the defendants broke and entered the said lands, and authorized the entry therein without lawful warrant of certain persons acting under the directions of the defendants, and broke up the same, and rendered them unfitted for the purposes for which they had been let; and she claimed an injunction and damages.

The defendants by their defence relied upon the provisions of the Defence of the Realm Act (4 & 5 Geo. 5, c. 29) and of

Regulation 2 L made thereunder, and pleaded that being of opinion that, with a view to maintaining the food supply of the country, it was expedient that they should exercise their powers under the said provisions; and being further of opinion that the said lands, which were in the county borough of Dublin, were immediately required for the purpose of being cultivated in allotments in order to provide necessary food for the residents in the locality, and that the use of the said lands was unreasonably withheld, they by an order under their seal, dated the 16th March, 1918, decided to enter upon the said lands and arrange for their cultivation in accordance with the said regulation; and in pursuance of the said order and under the powers given them in that behalf by the said regulation by an authorization in writing, dated the 16th March, 1918, duly authenticated under their seal, authorized the council of the borough of Dublin to exercise on behalf of the defendants the powers conferred upon the defendants by the said regulation of entering upon the said lands and arranging for the cultivation of the same, and that save as aforesaid they did not enter or authorize any entry upon the said lands.

The plaintiff by her reply pleaded that the said regulation was ultra vires and void, and that, if the same was intra vires and legal, the said order and authorization of the defendants was ultra vires and void.

*T. M. Healy K.C.* and *E. J. Kelly*, for the plaintiff.

*Serjeant Matheson K.C.*, *De Renzy K.C.*, and *M. B. Cooper*, for the defendants.

O'CONNOR M.R.:—

The question involved in this action is a purely legal one. I have got no concern with the alleged hardship which has been practised on the plaintiff. I have only to decide whether the defendants have acted and are continuing to act legally in taking and retaining possession of the plaintiff's lands. The action is brought to restrain the defendants from "withholding" the plaintiff's lands. This is the relief claimed, and I have to decide whether the plaintiff is entitled to that relief.

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The lands are situate in or near the urban district of Dublin, and the defendants entered upon them in professed exercise of the powers conferred upon them by sect. 2, sub-s. 8, of the Defence of the Realm Regulations. This sub-section enacts that where the Department of Agriculture and Technical Instruction are of opinion that, with a view to maintaining the food supply of the country, it is expedient that they should exercise the powers given to them under the regulations as respects any land, the Department may enter on the land in certain cases specified under the headings *a*, *b*, *c*, and *d*, which are set out. The present case comes under the heading *c*, and, therefore, I need not deal with the other headings. Under *c* the Department may enter on land without any consent if the land is situate in or near an urban district, and the Department are of opinion that, in order to provide necessary food for residents in the locality, land in or near the district is immediately required for the purpose of being cultivated in allotments, and that the use of the land for that purpose is unreasonably withheld.

Now, let us see what are the conditions subject to which this power is to be exercised. First, the Department must be of opinion that, with a view to maintaining the food supply of the country, it is expedient that they should exercise the powers. Secondly, they must be of opinion that, in order to provide necessary food for residents in the locality, land in or near the district is immediately required for the purpose of cultivation in allotments. Thirdly, they must be of opinion that the use of the land for that purpose is unreasonably withheld. Once it is found that the lands are in the specified locality—a fact which is not disputed here—these are the only conditions to be satisfied.

Now, the Department formed and expressed the opinions mentioned, and these opinions were announced in the only way in which a Department of State can pronounce an opinion. Is it possible for this Court to go behind these opinions? May this Court overrule them? I am clearly of opinion that it cannot. An attempt to do so would be an invasion of the jurisdiction conferred on the Department selected by the Legislature as the proper body to exercise it. The reason for giving that jurisdiction is obvious. The powers which are conferred are such

as must be promptly exercised. The matter is one which does not brook delay. It requires a summary procedure if it is to be effective, and hence it was necessary to prescribe a rather drastic measure.

I am clearly of opinion that this Court has no right to form any opinion at all as against that of the Department. I do not wish it to be understood that in a case where there was mala fides this Court would not have jurisdiction; but there is no such allegation in the present case. I was pressed by a consideration of the hardship endured by the plaintiff, whose lands have been taken, and no compensation given. As I have already said, I cannot decide this case on any such view; but I must say this: I asked the defendant's counsel had the plaintiff any legal right to compensation, and I understood them to allege that she had not, but that she might get compensation awarded by some commission of inquiry. That being so, I must point to a strange difference between the law of England and that of Ireland in this matter. Sub-ss. 1 to 7 of Regulation 2 L give the power of entry upon land to the Board of Agriculture and Fisheries. By sub-s. 4 the occupier is given the right to compensation. The Irish sub-sections give no right to compensation. Why is this? Was it an oversight? The only solution I can find is this:—In England the Board of Agriculture may enter upon any land, while in Ireland the Department is only entitled to enter upon three classes of land—(*a*) unoccupied land; (*b*) land which has not been cultivated according to Regulation 2 P; (*c*) land which has been unreasonably withheld. Possibly the Legislature thought that the parties entitled to such lands ought not to get any compensation, being people in default. This view is, I think, to some extent at least, confirmed by Regulation 2 M, which gives the Board of Agriculture in England power to enter on land not cultivated so as to increase food supply. I cannot find any provision as to compensation for the exercise of such power, and its absence may be accounted for by a determination not to give any compensation to people in default in England, as no compensation is given for persons in default in Ireland.

Lastly, I may say that I am not at all clear that the plaintiff is not legally entitled to compensation for the compulsory taking

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of her lands, because I do not see how any person can be accused of unreasonably withholding lands for which he is to receive no compensation of any sort. I have not, however, formed any final opinion on this point. I would have felt bound to do so if the action were framed otherwise than it is. It is not an action for a declaration that the plaintiff is entitled to compensation. It is an action for an injunction, and I have no course open but to dismiss it.

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1919. Dec. 20.

The plaintiff appealed to the Court of Appeal (1).

*T. M. Healy K.C.*, *Jellett K.C.*, and *E. J. Kelly*, for the appellant:—

Apart from the hardship to the plaintiff of valuable pasture lands being compulsorily taken from her, and destroyed by being turned into allotments, we contend that the entire transaction was illegal. The basis of the power to take the lands is that the use of the lands has been unreasonably withheld (2L 1).

There is no evidence of unreasonable withholding, nor could there be, as the lands are let in conacre, and the plaintiff, even if willing to empower the defendants to occupy the lands, could not do so. We further contend that the regulation, as made applicable to Ireland, is invalid and ultra vires. Sub-s. 4 of Regulation 2 L, which provides for compensation, is, by sub-s. 8 (iii), made inapplicable in the application of the regulation to Ireland. This amounts to a provision that lands may be acquired without compensation, and any such regulation is ultra vires and void. No statute empowers the making of such a regulation, and lands cannot be taken by the Crown at pleasure and without payment: *De Keyser's Royal Hotel, Ltd.* v. *Rex* (2).

They also referred to—*In the Matter of a Petition of Right* (3); *Cannon Brewery Company, Ltd.* v. *Central Control Board (Liquor Traffic)* (4); *Marquess of Clanricarde* v. *The Congested Districts Board for Ireland* (5).

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.
(2) [1919] W. N., p. 119.
(3) [1915] 3 K. B. 649.
(4) [1918] 2 Ch. 101.
(5) 31 T. L. R. 120.

*Serjeant Matheson K.C.* (*De Renzy K.C.*, and *M. B. Cooper*, with him):—

We do not contend that the existing right to compensation, if such there be, is taken away by the regulation.

SIR JAMES CAMPBELL C.:—

Having regard to the admission of Serjeant Matheson, we do not require to hear any further argument. In this case, the defendants, acting under the regulation in question, intimated to the plaintiff their intention to acquire two valuable farms, the property of the plaintiff, near Cabra, for the purpose of devoting them to allotments.

The plaintiff on receipt of this notice very naturally took up the attitude that this was a hardship upon her, and indeed it is probable that this was somewhat an extreme case in which to apply these compulsory powers, having regard to the fact that these were valuable pasture lands which might be seriously damaged if devoted to tillage purposes. An inspector, Mr. M'Carthy, was appointed—I presume by the Local Government Board—who held an investigation, which, as Mr. Healy has frankly admitted, was conducted with the greatest fairness, and with every latitude to the representatives of each side. We must assume that his report, which we have not seen, was acted upon by those responsible for his appointment, and eventually an order was made by the Department of Agriculture under which they went into possession of these lands. This order was impeached by Mr. Healy, first, by reason of there having been, as he contended, no evidence that the plaintiff had "unreasonably withheld" the lands. The regulation, however, itself entrusts that matter entirely to the public department; it provides that the order is to issue if the Department is of opinion that the land has been unreasonably withheld. It is not that the order is to issue if in fact the land has been unreasonably withheld, but if in the opinion of the Department it has been so withheld. The Department is accordingly the tribunal which has to determine, or rather to form an opinion upon, this matter of unreasonable withholding; and even if we were to arrive at the conclusion that there was not sufficient

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evidence in this case of unreasonable withholding (and I am far from so holding), it would not be within our jurisdiction or province to interfere with this matter, which is left by the regulation to the discretion and opinion of the public department itself. It has next been strenuously argued that the effect of these regulations, in the form in which they were made applicable to Ireland, is to destroy any existing right to compensation which might otherwise have been vested in the plaintiff. This contention is based upon the deliberate omission from the regulations as made applicable to Ireland of clause 2 L (4), which, in the application of the regulation to England, provides for compensation being paid at a definite time and by a particular tribunal to any person injuriously affected by the exercise of the powers under the regulation. Mr. Healy and Mr. Jellett have contended that this omission amounts to a negation of any right to compensation in the case of acquisition of any land under this regulation in Ireland. We are all of opinion that the omission has not this effect. If it had, the question would arise whether, as has been contended by Mr. Jellett, the regulation is ultra vires or not, but as we are of opinion that the right, if any, to compensation is not taken away, it is unnecessary for us to express an opinion upon this point, nor does the decision in *Keyser's Case* (1), to which we have been referred during the argument, affect the matter. The action is not one seeking a declaration that the plaintiff is entitled to compensation at common law or otherwise; it is merely an anticipatory action to prevent a threatened trespass, and inasmuch as we are of opinion that any existing right to compensation on the part of the plaintiff in respect of the entry upon her lands and any consequent injury thereto is not taken away or negatived by this regulation, and as Serjeant Matheson, on behalf of the defendants has so admitted, we must affirm the decision of the Master of the Rolls.

RONAN L.J.:—

I agree, and I shall only add a few words. Mr. Jellett has, with his usual precision and clearness, contended that this regulation, as made applicable to Ireland, must be construed as

(1) [1919] W. N., p. 119.

declaring that any existing right compensating a party injuriously affected by the exercise of the powers conferred by the regulations is thereby rescinded in Ireland. I find it impossible to hold that an existing right (if any) can be destroyed in such a manner. Regulation 2 L really consists of six sub-sections. Sub-section 7 provides for the application of these six clauses to Scotland, with certain necessary modifications, and then follows sub-s. (8), which applies the regulation to Ireland, subject to modifications, which include (iii): "Sub-sections (4) and (6) shall not apply." The effect simply is that one is in cases in Ireland to take and apply the regulation as if sub-sections (4) and (6) had been omitted therefrom; and it is to my mind impossible to contend that the regulation contains anything in the nature of repeal of any existing right to compensation.

O'CONNOR L.J. concurred.

Solicitors for the plaintiff: *Rooney & Co.*
Solicitor for the defendants: *The Chief Crown Solicitor.*

R. ST. J. C.

M. R.
1919.
May 2, 23.

## HIBERNIAN BANK *v.* YOURELL (No. 2).

*Mortgage—Receiver—Payment of rents and profits to the mortgagees—Right of mortgagees to appropriate towards payment of arrears of interest more than six years due — Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 24, *sub-s.* 8.

A receiver appointed by a mortgagee pursuant to the powers of the 24th section of the Conveyancing Act, 1881, being for all purposes the agent of the mortgagor, commits a breach of duty if he pays arrears of interest on the mortgage which are statute-barred; and if he pays over the rents and profits to the mortgagees, they cannot legally appropriate them to the payment of such arrears. "Due" in sect. 24, sub-s. 8, of the Conveyancing and Law of Property Act, 1881, means due and legally recoverable.

FURTHER CONSIDERATION OF ACTION.

The facts of the case, and the questions raised in the action, are reported in [1916] 1 I. R. 312, and [1918] A. C. 372.

Accounts having been brought in by the plaintiff on the basis of giving credit against the principal moneys secured by the mortgage for all moneys credited by them as principal moneys in the current account of the defendant, W. J. Yourell, a further question arose as to certain moneys received by the plaintiffs from the receiver, and appropriated by them in discharge of certain arrears of interest on promissory notes, such arrears being more than six years due at the dates of such appropriations.

The defendants contended that the plaintiffs were not entitled to make such appropriations.

*Herbert Wilson K.C.* and *Leonard K.C.* (*Marnan* with them), for the plaintiffs:—

At the dates when these moneys were received by the bank the arrears of interest, towards the discharge of which the bank appropriated them, though irrecoverable by action under sect. 42 of the Real Property Limitation Act, 1833, were, nevertheless, a debt due to the bank, and, since the moneys were obtained by the bank through the agency of a receiver appointed by them

under the powers vested in them by virtue of the mortgage deed, and whose position was not affected by the institution of the present action, those moneys were not recovered by "distress, action, or suit," within the meaning of that section.

The power of appointing a receiver only arises in the same circumstances as would have entitled the mortgagee to exercise his power of sale under the Conveyancing Act, 1881, sect. 20. Where the power of sale is exercised a mortgagee is entitled to retain out of the purchase-money in his hands arrears of interest which are statute-barred: *In re Marshfield, Marshfield* v. *Hutchins* (1). "Due" in sect. 21, sub-s. 3, of the Conveyancing Act, 1881, means legally due, whether recoverable by action or not. The same meaning must be given to "due" in sect. 24, sub-s. 8 (iv).

*S. L. Brown K.C.* (*MacCormack* with him), for the defendants other than W. J. Yourell:—

In the absence of express agreement a receiver can only appropriate moneys in his hands in the manner provided by the Conveyancing Act, 1881, sect. 24, sub-s. 8, which does not authorize the payment of arrears of interest which are statute-barred. A receiver is the agent of the mortgagor.

*Carrigan K.C.* (*J. H. S. Russell* with him), for the defendant W. J. Yourell.

*Cur. adv. vult.*

May 23.

O'CONNOR M.R.:—

On the taking of the accounts in this action a question has arisen as to the appropriation of certain moneys received by the receiver who was appointed by the plaintiffs as mortgagees over the property of the defendants.

It is unnecessary for me to give a general history of the facts which led up to the action. They are to be found in the judgment of this Court and the judgments of the House of Lords (2). Suffice it to say that at the times the moneys in question were received by the receiver there were owing to the plaintiffs large arrears of interest on certain bills of exchange or promissory notes, and a large part of these arrears was barred by the statute 3 & 4 Wm. 4,

(1) 34 Ch. D. 721. (2) [1916] 1 I. R. 312; [1918] A. C. 372.

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c. 27, sect. 42, under which not more than six years' arrears of interest could be recovered.

The moneys received by the receiver were not appropriated by him. All moneys were paid by him to the plaintiffs, leaving to them the mode of appropriation.

On the 29th January, 1913, the plaintiffs appropriated £73 6*s.*, on the 13th January, 1914, £156 10*s.* 1*d.*, and on the 29th January, 1915, £206 14*s.* 7*d.* towards payment of arrears which admittedly were barred. The question is—were they entitled to do so?

Let us see how the matter stands. The receiver was appointed by the mortgagees, but he was the agent of the mortgagors. The position of such a receiver is now well settled. At one time it was doubtful whether he was not really the agent of the mortgagee and was not to be considered the agent of the mortgagor only for the purpose of preventing the mortgagee from being charged as for wilful default. But this question has been set at rest by the judgment in *Law* v. *Glenn* (1), where it was laid down by Sir J. Rolt that the receiver must be treated as being for all purposes the agent of the mortgagor, and that the payments made by him to the mortgagee are payments made by a mortgagor continuing in possession of the mortgaged estate.

That being the position, what is the general duty of a receiver over a mortgagor's property appointed in the usual course by a mortgagee by deed? I conceive that it cannot be distinguished from the general duty owing by an agent to his principal. He must be faithful to him; he must act in his interest; he must protect him against claims which are not sustainable; he must not assume liabilities which cannot be enforced against his principal. It is a corollary from this that an agent to pay debts ought not without special authority to pay debts against which a principal is protected by the Statute of Limitations, because this would be to the detriment of the principal.

On the general law of agency I see no answer to this proposition, and I see no reason for excepting from it the case of an agent over a mortgagor's estate.

As against this, reliance is placed on sect. 24, subsect. 8, of the Conveyancing Act, 1881, which provides for the

(1) L. R. 2 Ch. 634, 641.

application of moneys received by a receiver. By that sub-sect. he is directed, after paying prior outgoings, to pay the interest accruing due (which has been interpreted as including both what has accrued as well as what is accruing) in respect of the principal money. It is argued, in the first place, that interest is due even though it cannot be recovered by action by virtue of the bar imposed by the Statute of Limitations. No doubt this is so, if the strictly technical meaning is to be given to the word "due" as used in the statute. But can it be said that we are bound to give a strictly technical meaning to the language of the section? To do so would be to ignore the decision of the Vice-Chancellor in *National Bank* v. *Kenny* (1), which decides that "accruing due" is not to be taken in its strictly technical sense, but means accrued and accruing.

How, then, can I give a strictly technical meaning to the word "due" so as to make it applicable to an irrecoverable debt? The drafting of the section is in loose language, and I think that I am bound to give an interpretation consonant with popular business ideas. The ordinary business man would be surprised at the distinction between an existing debt which is irrecoverable and a debt which has ceased to exist; and it seems to me that the true meaning of the section is that the receiver shall keep down the interest which the mortgagee is entitled to recover. This is at least a common-sense interpretation of a loosely drawn section, and it is entirely consistent with the duty of a receiver, who, as has been decided, is for all purposes the agent of the mortgagor, and in that capacity bound not to pay debts for which his principal cannot be sued.

For these reasons I am of opinion that if in the present case the receiver without special authority (which it is not pretended he had) had appropriated rents towards payment of interest which was barred by the statute, he would have been guilty of a breach of duty. In fact he did not do so. He paid over all moneys to the mortgagees, who themselves made the appropriation. They took upon themselves the act of appropriation. Knowing, as they must be taken to have known, that the receiver was acting in violation of his duty under the statute in not himself making the

(1) [1898] 1 I. R. 197.

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appropriation, they cannot by participating in his breach of duty claim any advantage from it. They cannot make an appropriation which the agent himself ought not to have made. These considerations have led me to the conclusion that the appropriations of rents towards payment of arrears of interest, which at the date of the appropriation were barred, were illegal, and cannot be insisted on.

Mr. Wilson in his ingenious argument referred to the 21st section of the Conveyancing Act, sub-s. 3, which regulates the distribution of the proceeds of sale by a mortgagee. This provides for the payment, after discharging the costs of sale, of the mortgage money, interest, and costs, and other money, if any, "due" under the mortgage. Here we have the word "due," and in the 24th section we have the words "accruing due." It is argued that the same meaning must be given to "due" in the 24th section as in the 21st. This would be in accord with the general canon for the construction of statutes, and it is sought to make use of it for the purposes of the present case in the following way:—Mr. Wilson showed that it has been decided that "due" in the 21st section includes arrears of interest which cannot be recovered by action, and he contends that, that being so, the same word must bear the same signification in the 24th section. This is an interesting point and deserves attention.

On consideration, it will be found that the construction which has been judicially put on the word "due" in the 21st section has been dictated by the general law governing the rights of mortgagees, just as the construction which I have placed on the same word in the 24th section has been forced upon me by the general law affecting principals and agents. Why has the word "due" as used in the 21st section been construed as meaning all moneys due, even though barred by the Statute of Limitations? For this reason: the mortgagee has himself received the proceeds of sale; they represent the mortgaged property; and inasmuch as a mortgagor can only redeem by paying all moneys due, so, if he brings an action for an account of the proceeds of sale in the hands of a mortgagee, he is only entitled to recover such balance as remains after paying the full amount of the mortgage debt, with all arrears of interest. This is

on the principle which governs suits for redemption: *In re Marshfield* (1); *Edmunds* v. *Waugh* (2). No doubt, this leads in the present case to giving two different meanings to the same word found in two sections of the same statute—a result to be avoided without good reason. "It is a sound rule of construction," said Cleasby B., "to give the same meaning to the same words occurring in different parts of an Act of Parliament": *Courtauld* v. *Legh* (3). It is, however, quite possible, "if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act": Turner L.J., in *In re National Savings Bank* (4). There are, indeed, instances of the same word being used in different senses in the same section of an Act (see Craies' Statute Law, p. 157, 1907 edition).

For these reasons I cannot yield to Mr. Wilson's argument that the word "due" in the 24th section must be construed in the technical sense which connotes a debt even though it should be irrecoverable by action. I must hold that the payments in question were not properly appropriated to arrears of interest which at the respective dates of appropriation were barred.

A minor question in the case is whether the Bank is entitled to charge interest on the bills at £6 per cent., although in the accounts as kept only £5½ per cent. interest was charged. I must hold that the Bank is bound by the accounts. To do otherwise would be to ignore the judgments of the House of Lords.

Solicitors for the plaintiffs: *D. & T. FitzGerald.*
Solicitors for the defendants: *T. O'Reilly & Sons.*

A. H. W.

(1) 34 Ch. Div. 721.
(2) 1 Eq. 418.
(3) L. R. 4 Exch. 126, 130.
(4) [1866] 1 Ch. App. 547, 550.

*Powell J.*
1919.
April 8, 9.
June 17.

## In re MOORE, Deceased.
## MOORE *v.* HIS HOLINESS POPE BENEDICT XV.

*Will—Uncertainty—Charitable Bequest—Bequest to the Pope "to use in the carrying out of the sacred office."*

Bequest of "£10,000 to His Holiness . . . the Pope . . . to use and apply at his sole and absolute discretion in the carrying out of the sacred office."

*Held*, void, as being applicable to purposes not strictly charitable and possibly illegal.

Originating Summons.

Andrew Moore died on the 1st of July, 1917, having made his last will, which contained the following:—"I bequeath the following legacies, that is to say, £10,000 to His Holiness Pope Pius X, or in the event of his death during my lifetime, his successor who shall be Pope at the time of my death, or should there be an interregnum, to the Pope who shall be then next elected within five years after my death, to use and apply at his sole and absolute discretion in the carrying out of the sacred office; and I hereby declare that the receipt of His Holiness entitled to the said legacy, or of the Cardinal Secretary of State at the Vatican, for and on behalf of His Holiness, shall be a sufficient discharge to my said trustees."

The executor brought the present summons for the determination of the questions as to the validity or otherwise of the bequest.

*Serjeant Matheson K.C.* and *MacCormack*, for the executor.

*M'Cann K.C.* (with him *Pigot K.C.* and *Murnaghan*), for the defendant:—

This is a good charitable legacy to the Pope in his official capacity as supreme pastor of the Church. The paramount duty of the sacred office is the spreading of the Gospel, to which end there are various ancillary means, such as teaching, organization, and discipline. The over-riding purpose of the gift is the promotion of religion: *Attorney-General* v. *Gladstone* (1); *Corcoran* v. *O'Kane* (2); *In re Garrard, Gordon* v. *Craigie* (3); *Attorney-*

(1) 13 Sim. 7. (2) [1913] 1 I. R. 1. (3) [1907] 1 Ch. 382.

*General* v. *Bishop of Chester* (1); *Sinnett* v. *Herbert* (2); *Society for the Propagation of the Gospel* v. *Attorney-General* (3); *Robb* v. *Dorrian* (4); *Dolan* v. *Macdermot* (5); *Townsend* v. *Carus* (6); *Powerscourt* v. *Powerscourt* (7); *Farquhar* v. *Darling* (8); *Kavanagh* v. *Kelly* (9); *M'Loughlin* v. *Campbell* (10); *In re Kenny, Clode* v. *Andrews* (11).

*D. J. O'Brien K.C.* and *Bacon*, for the residuary legatees :—

This bequest is void—1, because it attempts to create a perpetuity for a purpose not charitable; 2, for uncertainty; 3, as being contrary to public policy: *Morice* v. *Bishop of Durham* (12); *Thornber* v. *Wilson* (13); *Donnellan* v. *O'Neill* (14); *Dunne* v. *Byrne* (15); *In re Freeman* (16). If the gift is not confined to purely religious purposes, it is void for uncertainty: *Robb* v. *Dorrian* (4); *In re Jarman's Estate* (17); *Clibborn* v. *O'Brien* (18); *M'Loughlin* v. *Campbell* (10); *In re Davidson* (19); *Attorney-General of New Zealand* v. *Brown* (20). This money might be devoted to the support of Orders illegal in Ireland, such as Benedictines, Dominicans, Franciscans, which are charitable but not legal. The Benedictines are a great teaching Order. The gift might be applied in diplomatic channels by making gifts to foreign princes. A portion might be applied to the regaining of temporal power, which would be a political purpose and contrary to public policy. The regaining of temporal power would involve trouble with Italy, an ally: *Habershon* v. *Vardon* (21); Addis and Arnold's Catholic Dictionary, 787.

*Cur. adv. vult.*

(1) 1 Bro. C. C. 444.
(2) 7 Ch. A. 232.
(3) 3 Russ. 142.
(4) I. R. 11 C. L. 292.
(5) 3 Ch. A. 676.
(6) 3 Hare, 257.
(7) 1 Molloy, 616.
(8) [1896] 1 Ch. 50.
(9) 37 I. L. T. R. 71.
(10) [1906] 1 I. R. 588.
(11) 97 L. T. R. 130.
(12) 9 Ves. 399; 10 Ves. 521.
(13) 4 Dr. 350.
(14) I. R. 5 Eq. 523.
(15) [1912] A. C. 407.
(16) [1908] 1 Ch. D. 720.
(17) 8 Ch. D. 584.
(18) [1909] 2 Ch. 675.
(19) [1909] 1 Ch. 567.
(20) [1917] A. C. 393.
(21) 4 De G. & Sm. 467.

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June 17.

POWELL J.:—

This is an application on the part of Christopher Moore, the executor of Andrew Moore, late of Church Street, Athlone, in the county of Westmeath, merchant and farmer, that certain questions arising in the administration under the will and codicil of the deceased may be determined.

1. The first question is whether a legacy of £10,000 bequeathed by the testator's will to His Holiness the Pope, to which I shall particularly refer in a moment:—"£10,000 to His Holiness Pope Pius the Tenth, or in the event of his death during my lifetime, his successor who shall be Pope at the time of my death, or should there be an interregnum, to the Pope who shall be then next elected within five years after my death, to use and apply at his sole and absolute discretion in the carrying out of the sacred office; and I hereby declare that the receipt of His Holiness entitled to the said legacy, or of the Cardinal Secretary of State at the Vatican, or and on behalf of His Holiness, shall be a sufficient discharge to my said trustees," is a legacy to His Holiness Pope Benedict the Fifteenth, who was the Pope at the time of the testator's death, for His Holiness's own absolute use and benefit, or a legacy to His Holiness upon a trust.

2. If the said legacy is a legacy upon a trust, is the trust created by the said will a valid trust?

3. That the defendants Margaret Moore and John Moore may, if necessary, be appointed to represent the interest of the persons entitled to the residue of the testator's estate. At the hearing I made an order to this effect.

The affidavit of the executor, Mr. Christopher Moore, states that his brother, the deceased, Andrew Moore, late of Church Street, Athlone, in the county of Westmeath, died on the 1st July, 1917, his will being dated the 1st August, 1911, and a codicil thereto dated the 27th October, 1914, probate whereof was granted to him, as executor, on the 12th October, 1917. He states that His Holiness Pope Pius the Tenth predeceased the testator, and that Pope Benedict the Fifteenth, the present supreme pontiff, was Pope at the death of the testator. He

states that the persons contingently interested in the £10,000, the amount of the legacy, in case the gift in the will failed, included four minor children, namely, Mary Renahan, formerly Mary Moore, Catherine Moore, Thomas Moore, and Joseph Moore, children of the deceased's brother, William Moore, mentioned in the residuary bequest in the codicil dated the 27th October, 1914.

The gross value of the personal estate of the deceased for the purposes of estate duty appears to have amounted to £23,179 18*s.* 10*d.* The pecuniary charitable legacies bequeathed by the will, irrespective of the legacy in question in this matter, amount to the sum of £6,700 (about).

The bequest upon which the opinion of the Court is asked is as follows:—"I bequeath the following legacies, that is to say, £10,000 to His Holiness Pope Pius the Tenth, or in the event of his death during my lifetime, his successor who shall be Pope at the time of my death, or should there be an interregnum, to the Pope who shall be then next elected within five years after my death, to use and apply at his sole and absolute discretion in the carrying out of the sacred office; and I hereby declare that the receipt of His Holiness entitled to the said legacy, or of the Cardinal Secretary of State at the Vatican, for and on behalf of His Holiness, shall be a sufficient discharge to my said trustees."

Mr. M'Cann and Mr. Pigot, on behalf of His Holiness the Pope, contend that this is a good charitable legacy to him in his official capacity as supreme pastor of the Church, whose paramount duty and aim, as Mr. M'Cann puts it, is the spread of the Gospel, to which end, he says, there are various ancillary means, including teaching, organization, and discipline. He says that even if the words "to use and apply at his sole and absolute discretion in the carrying out of the sacred office" were absent, and that the gift were "to His Holiness the Pope," it would be a good charitable gift, the overriding purpose being the promotion of religion. It is not contended that the gift is one for the personal benefit of the particular successor of Pope Pius the Tenth who should be Pope at the time of the death of the testator, and who in fact was Pope Benedict the Fifteenth, the present Pope; and indeed it is quite apparent that the Pope was not intended to take

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any personal benefit, but was designated as the holder of the office of supreme pontiff.

Mr. O'Brien and Mr. Bacon, for the residuary legatees, contend that this is a bequest to His Holiness in trust; that the object and purpose of the trust is, as stated in the will, "the carrying out of the sacred office" of Pope; that the bequest is void as tending to create a perpetuity for a non-charitable purpose; that it is void for uncertainty; that it is void as being contrary to public policy, because it might be devoted to objects contrary to public policy.

Extremely able arguments were put forward by counsel on both sides. The case is in every aspect a most important one. I have given every consideration to the arguments, to the cases cited by counsel, and to many other decided cases, and I fear I must deal with the question which I have to determine at some length. In the first instance, I will deal with the principal authority cited by Mr. M'Cann in support of the validity of the bequest: *Attorney-General* v. *Gladstone* (1). In that case the testator gave to the Rev. Thomas Robertson £15,000, to be by him applied for the use of Roman Catholic priests in and near London at his absolute discretion. The Rev. Thomas Robertson died in the testator's lifetime, and it was held that the legacy was not void for uncertainty, and did not lapse by reason of the Rev. Thomas Robertson's death in the testator's lifetime, but was good as a charitable legacy, and that it must be applied for the benefit of persons filling the character of Roman Catholic priests in and near London at the testator's death, and afterwards according to a scheme to be approved of by the Master. It was contended by counsel for the defendant in that case that the testator intended to benefit only Roman Catholic priests existing in and near London at his death, and that the word "near" was so indefinite that it was impossible for the Court to say judicially what it meant; that the subject of the bequest was to be applied according to the absolute discretion of the Rev. Thomas Robertson, which it could not be, as that gentleman had died in the testator's lifetime.

The argument of counsel for the relators was that the testator

(1) 13 Simon, 7.

intended the legacy to be a permanent endowment for the support of the clergy of the Roman Catholic Church in London and its neighbourhood, the benefit of which was ultimately to enure to their congregations; and it was so held by Shadwell V.-C., and being a gift for a charitable purpose, it was held that any difficulty with regard to its application could be solved by directing a scheme to be approved by the Master.

It will be seen that the decision in this case turned entirely upon the particular words of the legacy in question and other legacies contained in the same will. It was not disputed that the legacy was a charitable one. In the present case one of the matters which I have to decide is whether this is a charitable legacy within the legal definition of the words. The bequest is not an endowment for the Pope, the benefit of which was ultimately to enure for a congregation, but it is for the purpose of the carrying out of the office of the Pope.

In *Corcoran* v. *O'Kane* (1) the bequest was as follows:—"At my wife's demise I desire that the two houses become the property of the parish priest of Urney on condition of paying £10 yearly to my brother's son Patrick, and also £1 yearly for Masses for the repose of the souls of the deceased members of the family." The testator died two days after the execution of the will. He was the owner in fee of the devised property. His widow died twenty-three years afterwards, on the 22nd February, 1911. At that date the priest of the parish of Urney was the third in succession in charge of the parish since the testator's death. It was held by Mr. Justice Barton that the devise of the freehold house property to the parish priest was a charitable devise, and therefore void as contravening the provisions of sect. 16 of the Charitable Donations and Bequests Act, the testator having died within three months from the date of the will. It was argued there that the devise was not a charitable gift, and that the defendant, the Rev. James O'Kane, who was the parish priest of Urney at the date of the death of the tenant for life, took the property absolutely, subject to the yearly payment of £10 to the testator's nephew Patrick; that the devise was to an individual priest in his private capacity; but Mr. Justice Barton held, on

(1) [1913] 1 I. R. 1.

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the authority of *Thornber* v. *Wilson* (1), that the testator intended that the devisee should be not any particular individual, but the parish priest at his wife's decease, whoever he might be, and without regard to whom he might be, and that, therefore, the gift should be construed to be a gift to the office, and to be of a charitable nature. In *Thornber* v. *Wilson* (1), the devise was to trustees, subject to a term of seven years, to sell and pay testamentary expenses and legacies; and as to the surplus, to pay it to the then minister of the Roman Catholic chapel at Kendal, who was also to be residuary legatee, and the nephew of the Roman Catholic minister living at the testator's death claimed the surplus money produced by the sale; but the legacy was held by the Vice-Chancellor to be a gift for the benefit of the minister as such, that is, that the testator meant to benefit the chapel, not the particular person, and as the law then stood it was void. The bequests, the subjects of the decisions in these two cases, in my opinion bear no resemblance to the bequest I am considering in this case. In *In re Garrard, Gordon* v. *Craigie* (2), Mr. Justice Joyce said that, having regard to the decision in *Thornber* v. *Wilson* (1), and *In re Delany, Conoley* v. *Quick* (3), it was clear that a legacy to the vicar for the time being of a parish was a charitable gift for the benefit of the parish for ecclesiastical purposes. He said that the words "to be applied by them in such manner as they shall in their sole discretion think fit" merely directed that the particular mode of application within the charitable purposes of the legacy was to be settled by those individuals, or rather that there was power given to them to do it, subject always to the jurisdiction of the Court. The gift in this case having been held to be "charitable," the indefiniteness of the object did not result in a failure of the gift.

In *Sinnett* v. *Herbert* (4) it was held that a gift for the endowment of a future church was not void under the Mortmain Act. A testatrix bequeathed to her executors £3000, "to be by them applied in aid of an endowment for a Welsh church now in course of erection at Aberystwith, and as for and concerning the residue of my personal estates and effects, subject to the payment of my debts, funeral and testamentary expenses, and the legacies herein-

(1) 4 Dr. 350. (2) [1907] 1 Ch. 382. (3) [1902] 2 Ch. 642. (4) 7 Ch. App. 232.

before by me bequeathed, I bequeath same to the said executors upon trust, to be by them applied in aid of erecting or of endowing an additional church at Aberystwith." Vice-Chancellor Bacon held that the gift of the residue was not intended to provide an endowment, except in the event of a church being erected or in course of erection at testatrix's death, and that the gift, therefore, failed. On the first hearing of the appeal before Lord Hatherley he pointed out that the earlier authorities were clear that if a particular purpose was frustrated, the bequest may be applied cy près. He referred to the *Attorney-General* v. *Baxter* (1), in which the gift was held to be void in consequence of its being supposed to be against the law to carry it into effect. He says the decree was afterwards reversed on the ground that the gift was not void, but that the original decree was that, as the bequest was against the law, it should be applied to some other charitable purpose; but that did not seem to be now recognized as the law. On re-argument, the Solicitor-General contended that a gift for a charitable purpose if lawful in itself is good, although no object might be in existence at the time; and he referred to the case of *Attorney-General* v. *Bishop of Chester* (2), to which Mr. M'Cann has referred me in this case, where the gift was for the purpose of establishing a bishop in His Majesty's Dominions in America. In that case the money was directed to remain in Court till it should be seen whether any bishop should be appointed. He further pointed out that the rule against remoteness was a technical common-law rule which has never been held to apply to charitable gifts; and he referred to the rule as being correctly expressed by Mr. Jarman in his work on Wills (vol. i, 3rd ed., 223): "If the donor declared his intention in favour of charity indefinitely without any specification of objects, or in favour of defined objects which happen to fail, from whatever cause, although in such cases the particular mode of operation contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate object, be carried into effect." Lord Hatherley adopted this view, and said that the course which seemed to be correct was to direct an inquiry at Chambers whether or not the

(1) 1 Vern. 247. (2) 1 Bro. C. C. 444.

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funds which were actually given to the trustees for the purpose of aiding in erecting or endowing a church at Aberystwith, or any and what part thereof, could be so laid out and employed. In reading this case and the cases referred to in the judgments it will be observed that it was not disputed that the gifts in question were good charitable gifts; but it was unsuccessfully contended that the doctrine of cy près did not apply to cases where the object of the gift was not in existence or likely to be in existence within a reasonable time, and that the gift failed absolutely.

Counsel next referred to *Powerscourt* v. *Powerscourt* (1). Viscount Powerscourt devised to trustees on trust (inter alia) to lay out at their discretion £2,000 per annum till his son came of age "in the service of my Lord and Master and, I trust, Redeemer." Lord Manners, in giving judgment, said he felt great difficulty in deciding the question, and had very little confidence in the conclusion to which he had come. He said the word "charity" was not necessary to bring a case within the purview of the statute of Elizabeth, on which the Court of Chancery proceeded in these cases, but that the cases proved that "pious" uses are a branch of charity, and as such are recognized and carried into effect, and he asked, on reading the passage in question, could anyone doubt that the testator meant to bequeath £2,000 a year to pious uses? It had been argued, he said, that the service of God includes our duty to our neighbour as well as that to God, and that it involved that great uncertainty and vagueness which rendered the bequest in *Morice* v. *The Bishop of Durham* (2) void. He said, "I think otherwise, and, considering the words of Sir William Grant in that case, namely, that no bequest has been established in England without either the word 'charity' or some specific object pointed out, I am of opinion that a bequest to pious uses sufficiently designates the specific object, and that this cannot be distinguished from a bequest to pious uses." The authority of this case depends upon the result of a comparison between the words of the bequest in the will of Viscount Powerscourt and the words of the bequest in the present case, and as to whether the bequest in the present case is a bequest to pious uses, or is indistinguishable from a

(1) 1 Molloy, 616. (2) 9 Ves. 399; 10 Ves. 521.

bequest to pious uses, so as to sufficiently designate the specific object, and I shall later on deal with that aspect of the case.

To the same effect and open to the same observation of substituting religious purposes for pious uses, as it appears to me, is the case of *In re Darling* (1). The will of the testatrix commences as follows:—"I desire that at my death all of which I may die possessed, with the exception of the few legacies and gifts I may hereafter make, shall go to the poor and the service of God." It was contended on behalf of the next-of-kin that a gift for the benefit of the poor generally, or to the poor of a particular place, was no doubt a good charitable gift, but a gift for the service of God was bad as being too vague, uncertain, and indefinite, and that when a good charitable gift and a bad charitable gift were mixed together, both of them failed; and on behalf of the Attorney-General it was argued that a gift to the service of God was equivalent to a gift for general religious purposes, for the word "service" must be taken to be used in a religious sense, and a gift for general religious purposes was a good charitable gift. Mr. Justice Stirling said that he thought when the service of God was spoken of as it was in that will, no one so construing the expression would hesitate to say that service in a religious sense was intended, and that if the matter was unaffected by authority he should come to the conclusion that gifts to the poor and the service of God were gifts to the poor and for religious purposes, and were good accordingly, and he relied upon the decision in *Powerscourt* v. *Powerscourt* (2), just referred to. He said it had not been disputed before him that a bequest for religious purposes was a good charitable bequest, and he held that the residuary estate was well given to charitable purposes.

Mr. M'Cann, as I have stated, contended that if the gift were to His Holiness the Pope without more it would be a good charitable gift. And great reliance was placed by him on the case of *Robb* v. *Dorrian* (1). There a testatrix, seised in possession of an estate in fee farm in land, who died within three months after the execution of her will, devised it in 1869 to the Right Rev. Patrick Dorrian, Roman Catholic bishop of Down and Connor, and his successors in said bishopric, and also

(1) [1896] 1 Ch. 50. (2) 1 Molloy, 616.

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bequeathed to him and his successors the sum of £2 annually, chargeable upon her said property, for the purpose of having Masses celebrated for the repose of her soul, and those of all members of her family, under which devise the defendant entered into possession. The plaintiffs claimed the same premises under a deed of conveyance executed in 1874, from the heir at law, who had never been in possession or receipt of the rents and profits. In an ejectment on the title the plaintiffs contended that the devise to the defendant was for a charitable purpose, and was, therefore, void under sect. 16 of 7 & 8 Vict. c. 97, inasmuch as the testatrix died within three months after the execution of her will, and that, consequently, the estate descended to the heir, as in the case of an intestacy. The defendant, on the other hand, contended that the devise was not for a charitable purpose, and that at any rate the conveyance to the plaintiffs of a pretended title was void under 10 Chas. 1, c. 15, sect. 2 (Ireland). It was held, affirming the decision of the Common Pleas, that the plaintiffs were not entitled, because (by Palles C.B., Barry J., and Dowse B.), although the devise was void, the deed was also void; (by O'Brien J.) the devise was valid and the deed void; (per FitzGerald B. and FitzGerald J.) the devise was valid.

The divergence of opinion amongst Judges of such great eminence as to the validity or invalidity of this devise is very remarkable. The Lord Chief Baron said, "The question upon which the validity of the devise will depend is whether the devise to the person who shall for the time being be Roman Catholic bishop of a particular district is or is not a pious or charitable gift within 7 & 8 Vict. c. 97, s. 16." Further on the learned Chief Baron said, "I apprehend that it is now settled beyond all doubt that a devise to a person who shall from time to time fill the office of minister of a particular church or of a particular congregation is of such a public and charitable nature as will, upon the one hand, be carried into execution upon information filed, and upon the other hand, will come within the scope of the English Mortmain Act. Such a devise is held to be charitable not with respect to the clergyman whose maintenance is the direct object of the devise, but with respect to the congregation who derive

(1) I. R. 11 C. L. 292.

spiritual advantage from the exercise of the functions of his office. . . . it is almost unnecessary to refer to authorities upon this question: *Thornber* v. *Wilson* (1) is conclusive. But when we are pressed as we have been with the assertion that that decision went too far, I think it right to observe that the cases in which devises to ministers and clergymen were held to be charitable extend back to the earliest period of our reports." He refers to several cases, and then says: "No doubt these cases do not directly decide the present question. They arose upon devises to clergymen as such, and were deemed charitable as having been made with the intent that the clergymen should perform the sacred functions of their office, and thus benefit or edify their congregations. Here the question arises upon a devise not to a clergyman as such, but to a bishop as such. These cases, however, coerce us to hold that the object and intent of the devise to the bishop as such was that he should perform the functions of his episcopal office, and the only portion of the question now before us which they leave unsolved is whether the functions of a Roman Catholic bishop are such that their performance is a benefit to the persons professing the Roman Catholic religion who are under his pastoral superintendence. The status of bishop comprises within it the status of clergyman. The bishop retains the power to perform all the functions of a clergyman, and the performance by him of those functions would undoubtedly be considered to be charitable as tending to the general benefit of his congregation. Again, a bishop alone can administer certain Sacraments, e.g., Confirmation and Holy Orders. I am of opinion that the functions of the priesthood being such that their discharge is deemed to be for the benefit of the public, the perpetuation of the Order of that priesthood must also be deemed to be for the public benefit, and that a trust for that purpose is a public charitable trust. I am also of opinion that the administration of the Sacrament of Confirmation to such members of the congregation under the pastoral superintendence of the bishop as under the ordinances and usages of the Roman Catholic religion are presented to him for that purpose is a benefit to the members of the public congregation who receive the Sacrament, and that this benefit partakes sufficiently of a public nature

(1) 4 Dr. 350.

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to render a trust for that purpose charitable. There may be certain functions of a bishop connected with Church government which possibly may not be charitable, but I am unable to draw any sound distinction between the effect upon a congregation of the exercise of the functions as a whole of a clergyman on the one hand and of a bishop upon the other, which would enable me to say that, while a gift to enable a clergyman to discharge his functions is charitable, a similar gift to a bishop is not. Irrespective, therefore, of any statutory recognition of the charitable nature of the devise for the benefit of a Roman Catholic bishop for the time being, I should be prepared to hold that it was essentially charitable." Having come to that conclusion, he was of opinion that the devise to the successor for the time being of Dr. Dorrian was charitable; and, therefore, he held the gift void, as the testatrix had died within three months of the execution of the will. Barry J. and Dowse B. agreed with this view.

On the other hand, Baron FitzGerald, Mr. Justice FitzGerald, and Mr. Justice O'Brien were of opinion that it was not a charitable devise. Although the words of the bequest in that case are not by any means similar to the words of the bequest in the will under consideration, I think that the judgments on this point of these three most distinguished judges is most important. Baron FitzGerald (at p. 317) says:—"The substantial question for our consideration, therefore, is whether the testatrix intended to create a charitable trust. If she did, it must fail by reason of the will not having been made three months before her death, and with it must fail the legal estate. Assuming, then, that the testatrix intended to give the land to the bishop of Down and Connor and his successors in said bishopric, every aid to be derived from the case of *Thornber* v. *Wilson* (1) is at an end. Substantially the only question in that case was whether the testator there intended to give the land to the present holder of an office and his successors in that office as such. No one doubted or could doubt that if he did so intend, then, having regard to the functions of that office, there was a charitable trust; but the question in this case is whether, having regard to the functions of the office named, there is a charitable trust. From the mere fact that it is intended to give the present holder of an office and to his successors in that

(1) 4 Dr. 350.

office, even in a case in which it is clear that a perpetual endowment of such office is meant, you cannot infer the existence of a charitable trust. . . . In the case of *Thornber* v. *Wilson* (1) and other cases cited the officers concerned were 'ministers of a congregation,' 'ministers of a chapel,' and the like. Everyone knows that the proper primary function of such ministers is the religious and moral instruction of the congregation or people who attend the chapel; and undoubtedly a provision for the moral and religious instruction of the people is a charitable use. But is this so with regard to the office of a bishop of the Roman Catholic Church in Ireland? The proper primary functions of such a bishop, as I think they would be generally understood, are the government of the clergy of his so-called diocese according to the rules of the Roman Catholic Church, and the general maintenance and discipline according to the rules of the same church throughout such diocese on the same conditions. I do not think that any authority can be found for holding that a provision for the government of the Roman Catholic clergy according to the laws of the Roman Catholic Church, and for the maintenance of the discipline of that church in a particular district is a charitable use. I am satisfied that there are no such authorities. No doubt, there may be a moral obligation on a bishop to give such time as he can spare from the performance of the proper primary functions of his office to the religious instruction of his people, but can I say that it was such moral obligation that was in the contemplation of the testatrix? Indirectly the government of the clergy may contribute to the instruction of the people through them, but I apprehend that such indirect and limited results do not make charitable trusts."

Mr. Justice FitzGerald, in dealing with this matter, said:—"It was urged by the plaintiffs that whether we read 'successors' as pointing out the one successor who should be such at the time of the death of the testatrix, or as meaning a line of successors in the bishopric, yet that the testatrix had clearly indicated an intention not to bestow any benefit on Bishop Dorrian personally, but on his office as bishop, and to his successor or successors in the office, and so it became a devise for a pious or charitable use within the meaning of the section. It was on this view that *Thornber* v.

(1) 4 Dr. 350.

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*Wilson* (1) was so strongly pressed on us. But it is observable that there the language of the several devises clearly expressed an intention to confer the benefits thereby given on the church and for the benefit of the church by making additions to the stipend of the officiating minister; and it was upon that ground that Kindersley V.-C. held the devise to be charitable, and therefore void, and on the same principle *Grieves* v. *Case* (2) was decided, where it was held that a devise in trust to apply the rents in maintaining a preacher at a Methodist chapel was a charitable use. It is to be observed here that there is no charitable or pious use expressed unless we can deduce it from the limitation to the 'successor.' The language of the gift seems to me to indicate no other intention than to give the property in question to Dr. Dorrian to dispose of as he might think fit, the testatrix, no doubt, assuming from his character and position that he would apply it to some good purpose. But if he should be dead, or if he had ceased to be bishop, at the time of her death, then to give the same property in like manner to the person who at the time of her death should be bishop. I should ask what is the trust, or what the charitable or pious use? Dr. Dorrian can dispose as he pleases of that gift to him, and if the gift to him fails, and that to his successor should take effect, the latter could equally dispose of the devise for his own benefit. It seems then to be only by interpreting "successor" as importing a continued line of succession that a foundation can be laid for suggesting a charitable or pious use. Supposing then the gift to be to Dr. Dorrian and his successors in the said bishopric, and not illegal and void, would it necessarily import a trust for charitable or pious uses? The Charitable Bequests Act does not create any new charitable or pious use, nor does it render illegal that which was legal before, although it avoids charitable gifts where the provisions of sect. 16 had not been fulfilled. The gift in the case before us is not coupled with the performance of any episcopal function or pastoral duties, or limited in enjoyment to the period during which such functions or duties may be performed, nor is it expressed to be for the maintenance or endowment of the bishopric, and it is obvious that each taker might apply the income as he thought fit.

(1) 4 Dr. 350. (2) 1 Vesey, Jr., 548.

No authority has been cited, either before the statute of Charles the First or since, in which it has been held that such a bequest as that now before us amounted to a charitable or pious use."

Now, Mr. M'Cann has submitted, as I have stated, that even without the words "to use and apply," &c., the gift here to His Holiness the Pope is a good charitable gift; but is this case an authority for that proposition? The Lord Chief Baron held that a gift to a bishop and his successor is so upon the principle that a devise to a person filling the office of minister of a particular church, or of a particular congregation, is of such a public and charitable nature as will be carried into execution—charitable with respect to the congregation who derive spiritual advantage from the exercise of the functions of his office—and relied upon cases in which devises to clergymen were deemed charitable as having been made with intent that the clergyman should perform such functions as would benefit or edify his particular congregation, and he extends that principle to the status of a bishop on the ground that he retains power to perform all the functions of a clergyman, and that the performance by him of those functions would undoubtedly be considered as charitable, as tending to the general benefit of his congregation.

Baron FitzGerald, Mr. Justice FitzGerald, and Mr. Justice O'Brien all considered that the extension of the principle, even to a bishop, was not warranted by authority. But, as it appears to me, it would require a still further extension of this principle to make it applicable to the case of the sovereign pontiff, whose functions, powers, and duties are of an infinitely wider and more extensive nature. He is, as Mr. M'Cann pointed out, the supreme head of the Catholic Church; he is in supreme control of its interests, its objects, and its destiny. In that position, can his powers and his duties, and their exercise and their fulfilment in "his office" be confined within the limits suggested in the case which I have just quoted? I am of opinion that they cannot be so confined.

The cases to which I have referred up to this point are cases of very high authority, and I have dealt with them in deference to Mr. M'Cann's very able argument; but, with great respect, I

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do not think they, or any of them, solve the difficulty in the present case. I am construing here particular words of a particular bequest in the will of Andrew Moore "to use and apply at his sole and absolute discretion in the carrying out of the sacred office." In my opinion this is a bequest in trust, in the events which have happened, to His Holiness the Pope, Benedict XV, as trustee, of £10,000 for the purpose of carrying out, at his sole and absolute discretion, and without restriction, the sacred office of the Pope, that is, all the functions of the office of the Pope described by the testator—a pious Catholic—as the sacred office; for I do not take the use of the word "sacred" as being intended by the testator as in any way restricting or cutting down the discretion of His Holiness in regard to the application of the legacy to such purposes as might come within the definition of the word "sacred"; but I take it as being used as a word of respect and reverence by the testator when describing the office or function of the supreme head of the Roman Catholic Church. What is the office? What are its functions? What are the duties and powers of the pontiff in his "office" as Pope and supreme pontiff? Mr. M'Cann says that the paramount duty and aim of the Pope in his official capacity as supreme pastor of the Church is the spreading of the Gospel, in aid of which there are various ancillary means, including teaching, organization, discipline. Can it be said that these exhaust the functions and powers of His Holiness "in the carrying out of his office"? No evidence on this point, either by affidavit or otherwise, was given on the hearing of this application, but Mr. O'Brien referred me, without objection, to two works—one, the Irish Catholic Directory for 1919, published in Dublin, and the other, Addis & Arnold's Catholic Directory, 1917, 9th ed., published in London. He has referred me to the title of His Holiness the Pope as set out in that work, and, as it appears to me, some, at any rate, of the functions of "the office." His Holiness the Pope is described as Bishop of Rome, and Vicar of Christ, Successor to St. Peter, Prince of the Apostles, Supreme Pontiff of the Universal Church, Patriarch of the West, Primate of Italy, Archbishop and Metropolitan of the Roman Province, Sovereign of the Temporal Dominions of the Holy Roman Church. It is stated that His

Holiness Benedict XV retains (inter alia) the Directorship of the Benedictine, Dominican, and Franciscan Orders. It is further stated that he is assisted in the government of the Church by the sacred college of Cardinals, and by several sacred congregations of which the Cardinals are the chief members; by the patriarchs, archbishops, and bishops; by the apostolic delegates, vicars, and prefects; and by certain abbots and prelates. The duties and functions of the several sacred congregations are defined under the head of the Roman Congregations and Tribunals, which appear to consist of eleven congregations and three tribunals. To one of these congregations is given charge of the discipline of the secular clergy and the faithful generally; controlling matters relating to or affecting pious associations, pious legacies, benefices or offices, ecclesiastical property, funds and other matters of the same kind. Another congregation has the right of examining and regulating all matters which proximately concern the rites and ceremonies of the Latin Church, bestows insignia and privileges of honour relating to sacred rites, and prevents the introduction of abuses in these matters. Another congregation regulates the ceremonies to be observed in the Pontifical Chapel and Court, and settles questions as to the precedence of cardinals and ambassadors sent by various countries to the Holy See. Another congregation considers such questions as are submitted to it by the Pope through the Cardinal Secretary of State, an official actually referred to in the bequest in the will in this case, whose receipt for the legacy is to be sufficient, and to this congregation especially questions connected with the civil law and concordat entered into with different States are assigned. Another congregation examines and approves new institutions, grants the power of conferring degrees, and may itself confer degrees on men of distinction.

It is stated in Addis & Arnold's Catholic Directory that the Pope is the supreme judge in all controversies of faith, and he may and does exercise the power immediately or through the sacred congregation; to him the supreme direction of discipline belongs; it is his duty to see that the Canons are observed, and to this end he may send legates and nuncios to distant provinces, and receive appeals from all persons in all parts of the world; he alone

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can erect, suppress, and divide dioceses; he alone can approve new religious Orders, and exempt them if he sees fit from episcopal jurisdiction.

It will be seen, therefore, that the functions of His Holiness in his office are not confined to matters which can be described as charitable in the widest signification of that word. They extend to matters wholly outside and apart from charity, and would include the promotion of good literature, power of exercising discipline, bestowal of the insignia and privileges of honour, the regulation of the precedence of ambassadors, and various questions connected with the civil law. Moreover, it would be competent for His Holiness, as has been pointed out by Mr. O'Brien, on the terms of this gift to apply it for purposes which, in this country, are illegal. In addition, it has been pointed out by Mr. O'Brien and Mr. Bacon that the claim to temporal power is insisted upon by His Holiness and resisted by the government of the reigning Sovereign of Italy; and I have been referred to a further statement in Addis & Arnold's Dictionary, p. 787, which is as follows:—"The Popes have not ceased to declare on all fitting occasions that the preservation of their temporal independence is necessary, as human affairs are constituted, to the free and full exercise of their spiritual authority." It would appear to me to be clear that it would be perfectly competent, and, from the point of view of His Holiness, justifiable, to apply this gift for furthering and advancing his claim to temporal power. It appears to me to be plain that the functions of the office of His Holiness extend to matters which, though considered to be vital to his spiritual authority as supreme pontiff of the Catholic Church, are as regards some of them not charitable within the legal definition of the word; and as regards others of them, not only not charitable in that sense, but in regard to some matters contrary to the laws of these realms. There is nothing, as far as I can see, to control the discretion of His Holiness, nor is the purpose restricted in any way to "charitable objects," nor can I see any evidence of any intention on the part of the testator to so restrict or control the discretion of His Holiness. It is well settled by a whole series of authorities that where a bequest is for charitable purposes, and also for purposes of an indefinite nature not charitable, and no apportionment of

the bequest is made by the will, so that the whole might be applied for either purpose, the whole bequest is void; and although a trustee be named, it is now established that the Court will only recognize the validity of trusts which it can either itself execute or can control when in process of execution by the trustee.

In *Morice* v. *The Bishop of Durham* (1), which came on by way of appeal on behalf of the defendant, the Bishop of Durham, from a decree of the Master of the Rolls, it was held that a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, could not be supported as a charitable legacy, and was, therefore, a trust for the next-of-kin. The Lord Chancellor having shown that if the execution of a trust is to be under the control of the Court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the Court, or, if the trustee dies, the Court itself can execute the trust, and a trust, therefore, which in a case of maladministration could be reformed and a due administration directed, and that, unless the subject and the objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct a due administration, goes on to say :— "Looking back to the history of the law upon this subject, I say, with the Master of the Rolls, that a case has not been yet decided in which the Court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose or devotes the property to purposes of charity in general. Upon those cases in which the will devotes the property to charitable purposes described observation is unnecessary. With reference to those in which the Court takes it upon itself to say, it is a disposition to charity, where in some the mode is left to individuals, in others the individuals cannot select either the mode or the objects, but it falls upon the king, as parens patriae, to apply the property, it is enough at this day to say the Court by long habitual construction of those general words has fixed the sense ; and where there is a gift to charity in general, whether it is to be executed by individuals selected by the testator himself or by the king, it is the duty of such trustees on

(1) 9 Ves. 399 ; 10 Ves. 521.

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the one hand and of the Crown upon the other to apply the money to charity in the sense which the determinations have affixed to that word in this Court, namely, either to such charitable purposes as are expressed in the statute or to purposes having analogy to those. . . . The question, then, is entirely whether this is according to the intention a gift to purposes of charity in general, as understood in this Court—such that this Court would have held the bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered in obedience to decrees, where the gift is to charity in general; or is it or may it be according to the intention, to such purposes, going beyond those, partially or altogether, which the Court understands by 'charitable purposes'; and if that is the intention, is the gift too indefinite to create an effectual trust to be here executed? The argument has not denied, nor is it necessary in order to support the decree, that the person created the trustee might give the property to such charitable uses as this Court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary to support this decree to contend, that the trustee might not, consistently with the intention, have devoted every shilling to uses in that sense charitable. But the true question is whether, if upon the one hand he might have devoted the whole to purposes in this sense charitable, he might not equally, according to the intention, have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes these words; and if, according to the intention, it was competent for him to do so, I do not apprehend that under any authority upon such words the Court could have charged him with maladministration if he had applied the whole to purposes which, according to the meaning of the testator, are benevolent and liberal, though not acts of that species of benevolence and liberality which this Court in the construction of a will calls charitable acts. . . ." "The question is, whether according to the ordinary sense, treating upon the great and extensive sense of the word 'charity' in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this Court would have enforced by decree and reference to a Master.

I do not think that was the intention, and if not, the intention is too indefinite to create a trust. But it was the intention to create a trust, and the object, being too indefinite, has failed." This is a case which has been probably referred to more frequently on this particular branch of the law than any other case, and, as far as I can discover, retains down to the present date its authority unimpaired. It will be found cited in arguments, and referred to in judgments of the most distinguished judges down to the most recent date.

Applying the principles of this decision to the bequest in the present case, it may be that His Holiness might give the entire of this legacy to such charitable uses as the Court holds to be charitable uses within the ordinary meaning; but the true question is whether if upon the one hand he might devote the whole to purposes in this sense charitable, he might not equally devote the whole to purposes benevolent and liberal, or to purposes conducive to any of the functions or objects of his sacred office, which are not purposes charitable in that sense; and if it is competent for him to do so, could the Court charge His Holiness with maladministration if he applied the whole of the legacy to such purposes. And, as I have said, I cannot find any evidence in this bequest of any intention on the part of the testator to restrict in any way the application by His Holiness of this legacy to any purposes to which he might apply them for carrying out "the sacred office."

In *James* v. *Allen* (1) the bequest was—"I give and bequeath the same [i.e. the residue] to my friends, William Allen, Joseph Allen, and William Matthews, whom I constitute and appoint the executors of this my will in trust to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on." The Master of the Rolls, Sir William Grant, said:—"The question is, what authority would this Court have to say that the property must not be applied to purposes, however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite

(1) 3 Mer. 17.

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for the Court to execute," and the learned Master of the Rolls said that he considered the point had been decided in *Morice* v. *The Bishop of Durham* (1); though if it were still open he would not entertain any doubt on the question. And I ask myself, what authority would this Court have to say that this legacy must not be applied by His Holiness to purposes legitimately appropriate to the carrying out of the sacred office unless they came within the technical denomination of charitable purposes?

In *Williams* v. *Kershaw* (2) a direction by a testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they, in their discretion, should think most advantageous and beneficial, and for no other use, intent, or purpose, was held void for uncertainty. The Master of the Rolls (Lord Langdale) said:—The first matter to inquire into was what the testator meant by those expressions. He had before given legacies for education, for the Baptist Missionary Society, for the poor generally, for dissenting ministers, and for a village school, which bequests included, in the ordinary acceptation of the term, objects benevolent, charitable, and religious. (Just as here the testator has given several charitable legacies.) It was argued, in order to prove the gift to be good, that the terms must be taken conjointly, and if so applied the application must be to a religious purpose, which would, no doubt, be benevolent, and, in a legal sense, charitable; but the question was, did the testator so consider it? Did he mean that there should be no application of any part of the residuary fund except to "religious purposes"? Such did not appear to be his intention. He intended to restrain the discretion of the trustees only within the limits of what was benevolent, or charitable, or religious. If this be the right construction, then the question is what the decisions have ascertained to be the rule on this subject. He referred with approbation to the doctrine laid down by Lord Eldon in *Morice* v. *The Bishop of Durham* (1), by Sir William Grant in that case, and in *James* v. *Allen* (3), and other cases, and said he was of opinion that this gift could not take effect, and

(1) 9 Ves. 399; 10 Ves. 521.
(2) 5 Cl. & F. 111.
(3) 3 Mer. 17.

that the ultimate residue was undisposed of. This decision was affirmed by Lord Cottenham.

In *Ellis* v. *Selby* (1) a testator, having given a fund to his executors upon certain trusts, declared it to be his will that, in the event of the failure of those trusts—an event which happened—his said trustees, and the survivors and survivor of them, his executors or administrators, should pay or apply the fund to and for such charitable or other purposes as his trustees, executors, or administrators should think fit, without being accountable to any person or persons whomsoever for such their disposition thereof; and it was held that these words created a trust, but a trust of so indefinite a nature that it could not be carried into effect. The bequest, therefore, failed, and the fund fell into the residue. Lord Cottenham L.C., who heard the appeal from the decision of the Vice-Chancellor, first deals with the question as to whether the trust was sufficiently declared, and he held it was. He then proceeded to say:—"Another point made was that the Court would divide the fund between the charity and the other objects, but the point was very properly abandoned. The question, therefore, remains whether this gift is too indefinite to be carried into effect. That question is, as nearly as possible, the same as that which I lately decided in *Williams* v. *Kershaw* (2), or at least it comes quite sufficiently close to it to bring it within the same principle. I came to the conclusion that in the bequest in the will in that case there was a discretion in the trustee to apply the fund. . . . In the course of my judgment in that case I investigated all the authorities which were then brought under my consideration. Some of them, perhaps, were not quite consistent; but I came to the conclusion upon the authority of two cases decided by Sir William Grant. In *Morice* v. *The Bishop of Durham* (3) Sir William Grant lays down the rule in these terms: 'The question is not whether the trustee may not apply it upon purposes wholly charitable, but whether he is bound so to apply it'; and, in *James v. Allen* (4), he says: 'If the property might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute.'

(1) 1 My. & Cr. 286.
(2) 5 Cl. & F. 111.
(3) 9 Ves. 399; 10 Ves.
(4) 3 Mer. 17.

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In this case the appellants contend that the latitude given is so great that the terms of the bequest amount to an absolute gift, and yet they contend that the bequest is so strictly charitable as to be capable of being carried into effect as such. I am of opinion, however, that the discretion is not so large as to relieve the gift from being a trust, but that it is too indefinite to be carried into effect, and consequently, that the gift fails, and that the Vice-Chancellor's decree is right."

In *Kendall* v. *Grainger* (1) there was a bequest of personalty to trustees, to be applied for the relief of domestic distress, assisting indigent but deserving individuals, and encouraging general utility; and it was held void as a charitable bequest. The Master of the Rolls (Lord Langdale) said:—"The question arising upon this will is whether the trustees are bound to apply the fund wholly to a charitable purpose; for to make it valid it must, according to the decisions, be obligatory on them. It is not a question whether the trustees may apply it to a charitable purpose, but whether by the words of the will they are bound to do so. The decisions go to this further extent that they must have no option between the charitable and any other purpose."

In *In re Jarman's Estate* (2) a testator who died in October, 1875, having given numerous charitable and pecuniary legacies, directed that his executors should apply to any charitable or benevolent purpose they might agree upon, and at any time, the residue of his personal property which by law might be applicable to charitable purposes. The executors in January, 1876, in writing, agreed that the residue should be paid to a charitable institution to which the testator had also given a legacy; and it was held that the direction to the executors was indefinite and inoperative, and that the gift failed. In this case the testator had actually by a codicil, dated 11th June, 1875, given an additional £1,000 to the Governors of the General Hospital near Nottingham, to be applied to the use of that charitable institution; and he also gave additional and further legacies to the hospital, and a person named; and the executors by writing under their hands agreed and declared that the residue of the testator's personal property which by law might be applied to charitable purposes should be paid to the treasurer

(1) 5 Bev. 300. (2) 8 Ch. D. 584.

for the time being of the General Hospital near Nottingham, to be applied to the charitable purposes of that institution; and it was pointed out by counsel for the Governors of the hospital very forcibly that the words were clear and positive that the executors should apply the residue to any charitable or benevolent purpose that they might agree upon; that they had agreed to apply the whole of it to the charitable institution named; that they had power to apply the residue to the one or the other of the two purposes mentioned; that in a case where there were several charities, and one of them lawful and the others unlawful, the executors could properly apply the residue to the lawful purpose, and that, therefore, the hospital was entitled to the fund. The Vice-Chancellor in his judgment said: whether or not the distinction which has been contended for between the present case and *Ellis* v. *Selby* (1) and the other cases referred to, particularly the case of *Williams* v. *Kershaw* (2), was right, or whether it might be better to adopt the view suggested by counsel for the hospital, that if there be one purpose which can be lawfully executed it should be done; he was of opinion that he was bound by the decision in *Ellis* v. *Selby* (1) and the other cases cited, and that he must hold that in this case the direction had reference to a gift, a trust which the Court could not execute. The cases showed that the test was this, that the Court is not to wait and see whether the executors will appoint charitable objects or not, but to look at the will as at the date of the death of the testator, and at once say whether the gift is definite or indefinite, and if the latter, that it is inoperative. That was the case there; and he held that the gift of the residue failed, and that it belonged to the next-of-kin. This case has been referred to and approved of in subsequent cases of very high authority.

In *In re Macduff* (3) Mr. Justice Stirling, having reviewed the authorities, said:—"In order that a bequest may be valid, the purposes as defined by the testator's will must be charitable in the technical sense in which that word is used in this Court." He referred to *James* v. *Allen* (4); *Kendall* v. *Grainger* (5); and said that he

(1) 7 Sim. 352.
(2) 5 Cl. & F. 111.
(3) [1896] 2 Ch. 451.
(4) 3 Mer. 17, 19.
(5) 5 Beav. 300.

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conceived himself bound by authority to declare that it was not a trust which could be carried into effect as a charitable purpose. On appeal Lord Justice Lindley (at p. 463) said :—" In dealing with bequests framed in general language like this, without any context to help us, what have we to get at in order to hold such a general indeterminate bequest to be valid? We must get at something sufficiently definite to guide the Court as to the kind of trust which it has to execute, and that trust must be of the kind called technically a charitable trust." To show that that is the right principle, he referred to the leading case of *Morice* v. *The Bishop of Durham* (4), and said that the judgment of Lord Eldon in that case is one of the most important upon all questions of charity. He referred to Lord Eldon's remark that the Court had taken strong liberties upon the subject of charities, but that, notwithstanding the strong liberties that it had taken, there were certain principles which had always guided the Court. He said that the principle of that case had been enunciated or repealed from time to time, as would be found on reference to the cases of *James* v. *Allen* (2) and *Ellis* v. *Selby* (5). " Therefore," he says, " when we are dealing with general words we must consider whether there is such an indication of purpose or of principles that the Court if called upon to execute it can see what it has to do, can see the limits of its own powers." He discusses the meaning of the word " philanthropic." He said : " The testator means by that something distinguished from ' charitable ' in the ordinary sense, but I cannot put any definite meaning upon the word. All I can say is that a philanthropic purpose must be a purpose which indicates goodwill to mankind in general." I do not know with anything like certainty was is meant by philanthropic, and not knowing what is meant by philanthropic, it follows that the trustees of this will can apply this £10,000 to purposes which might or might not be charitable in the technical sense of that description. If so, this general disposition cannot be upheld as a charitable bequest. Could the Court in this case, if called upon to execute the trust—that is, the purpose of the carrying out of the sacred office—see what it had to do or see the limits of its powers? And Lord Lopes said :—" Looking at the words, I ask myself whether or not this

(1) 9 Ves. 399; 10 Ves. 521. (2) 1 My. & Cr. 286. (3) 7 Sim. 325.

property might consistently with the will, having regard to the word 'philanthropic,' be applied to other than strictly charitable purposes, and I feel compelled to answer that question in the affirmative." I ask myself in this case whether or not this legacy might not, consistently with the will, having regard to the words "to use and apply at his sole and absolute discretion in the carrying out of the sacred office," be applied to other than strictly charitable purposes. Lord Justice Rigby says at the end of his judgment:—"I think that the cases which establish that you must have words sufficiently defining the testator's meaning and sufficiently showing that it is a 'charitable meaning' according to the standard supplied by the statute of Elizabeth, and by the analogies to that statute, still prevail. In my mind the word 'philanthropic' is too wide, and the judgment of Stirling J. must be affirmed." But the word "philanthropic" is not, I think, as wide as the words of the bequest in the will under review.

In *Hunter* v. *Attorney-General* (1) the testator by his will declared that his residuary estate, or so much thereof as should be legally applicable to charitable purposes, should be transferred by his general trustees to special trustees in trust to apply the income, or any portion of the capital, in grants for or towards the purchase of advowsons or presentations, or in creating or contributing to the erection, improvement, or endowment of churches, chapels, or schools, or paying or contributing to the salaries or incomes of rectors, vicars, or incumbents, masters or teachers; but upon certain conditions. The conditions were framed with a view to the promotion of true Protestant and Church of England principles, distinguished as evangelical, and, though applicable to the other purposes, were not applicable to the purchase of advowsons or presentations. It was held that, since upon the true construction of the will, no trust, charitable or other, which the Court could execute or control was annexed to the advowsons or presentations for the purchase of which the trustees had power to make grants, and there being no general trust for charity binding the whole fund, the whole gift failed, and the residuary estate was undisposed of. The decision of the Court of Appeal (2) was reversed, and the decision of Romer J. (3) restored. Lord

(1) [1899] A. C. 309. (2) [1897] 2 Ch. 105. (3) [1897] 1 Ch. 518.

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Halsbury said:—"It does not appear to be doubted that if Mr. Justice Romer was right in holding that the first purpose which the testator in this case has described as being the purpose to which some part or all of the fund, according to the discretion of the trustees, may be applied is not charitable in the sense in which that word is understood by the Court of Chancery, then the whole gift must fail. It is undoubtedly the law that where a bequest is made for charitable purposes, and also for an indefinite purpose not charitable, and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void . . . The process of reasoning by which the Court of Appeal has come to the conclusion that they have the right to read the testator's will as establishing the charitable trust on the words to which I have referred is this: they say that they are sufficiently satisfied of the testator's intention by referring to other parts of his will . . . Judging of his religious views from what he has said in other parts of his will, I have no doubt whatever that his general intention was to aid the particular school of religious thought of the Church of England to which he was himself attached; but it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, you can supply words and declare trusts which are not to be found in the will itself; that, to put it plainly, the testator's intention is to be judged by the general desire that he expresses, and have his money devoted to such a purpose. To create a trust by such a process of augmentation as that appears to my mind to be not interpreting the will, but making a will for the testator." Lord Davey, having discussed the particular provisions in the will in question, says:—"What, then, is the law applicable to the case? There are two classes of authorities. On the one hand, there is a long series of cases, extending from *Morice* v. *The Bishop of Durham* (1), decided by Sir William Grant and Lord Eldon, to *In re M'Duff* (2), and including two decisions of Lord Cottenham. . In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy

(1) 9 Ves. 399; 10 Ves. 521. (2) [1896] 2 Ch. 451.

and indefinite nature that the Court cannot execute them, such as charitable or benevolent, or charitable or philanthropic, or where the description includes purposes which may or may not be charitable, such as undertakings of public utility, and a discretion is vested in the trustees, the whole gift fails for uncertainty." .

In *Vezey* v. *Jameson* (1) the trust was to dispose of the residue in such charitable or public purposes as the laws of the land would admit, or to any persons as the trustees in their discretion should think fit, or as they should think would have been agreeable to him if living, and as the laws of the land did not prohibit. Sir John Leach said: "The testator has not fixed upon any part of this property a trust for a charitable use, and I cannot, therefore, devote any part of it to charity. The necessary consequence is, that the purposes of the trust being so general and indefinite, they cannot be executed by this Court; they must fail altogether, and the next-of-kin become entitled to the property.

"On the other hand, it has been decided in cases such as *The Attorney-General* v. *Doyley* (2) and *Salusbury* v. *Denton* (3), that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable, the trust does not fail, but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally. I have come to the conclusion that the present falls within the first class of cases. As Sir William Grant says in *Morice* v. *The Bishop of Durham* (4), the question is not whether the trustee may apply it for purposes strictly charitable, but whether he is bound so to apply it. The answer to that question in the present case can only be that there is no such obligation. On the other hand, the other purposes to which conceivably the trustees may apply the whole fund in their discretion are not described with sufficient definiteness for the Court to attach any trust upon them. A third class of cases was relied on by the Attorney-General, of which *Sinnett* v. *Herbert* (5) and *In re Douglas* (6) are examples, in which there is a general over-riding trust for charitable purposes, but some of the particular purposes to which

(1) 1 S. & S. 69.
(2) 7 Ves. 58 n.
(3) 3 K. & J. 529.
(4) 9 Ves. 399; 10 Ves. 521.
(5) L. R. 7 Ch. 232.
(6) 35 Ch. D. 472.

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the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the trust is good, and the Court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purpose or in the manner which is objectionable. But, in my opinion, those cases have no application to that before your Lordships, because, as I have already said, I think that there is not here any general trust for charity binding the whole fund."

Now applying that to the bequest in the present will, is there here any general trust for charity binding the whole fund? Is this a case in which there is a general overriding trust for charitable purposes, with particular purposes indicated which are not strictly charitable, and from which the Court could give effect to the general charitable trust restricting the trustee from applying the funds to the particular purpose or in the manner which is objectionable? I think not. How could His Holiness here be restricted from applying the fund to the purpose indicated by the language of the bequest itself, namely, the carrying out of the sacred office? There could be no apportionment between charitable objects and definite and ascertainable objects. There is no distinction drawn in the bequest between charitable objects and non-charitable, definite, and ascertainable objects. The objects are not even described as charitable or benevolent, or charitable or philanthropic, or charitable or pious; but as it appears to me the description does include purposes, some of which may be charitable and some of which are not charitable; and a discretion is vested in the trustee to apply the whole of the bequest to purposes which are not charitable.

In *In re Davidson* (1) a residuary bequest in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed by him between such charitable, religious, or other societies, institutions, persons, or objects in connexion with the Roman Catholic faith in England as he should in his absolute discretion think fit, was held not a good charitable bequest, but void for uncertainty. There testator devised and bequeathed his residuary personal estate and his real estate upon trust for sale

(1) [1909] 1 Ch. 567.

and conversion, and after payment thereof of his funeral and testamentary expenses, and the legacies thereinbefore bequeathed, and subject thereto, upon trust, to pay certain charitable legacies, including a legacy of £4000 to the Roman Catholic Archbishop of Westminster for the time being, to be expended in such manner as he might think fit and proper upon the altar or the ornaments on same, or round about the altar in the chapel of the Blessed Virgin Mary in the Roman Catholic cathedral, then in course of erection at Westminster; and he directed his trustees to hold the residue of his real and personal estate, and the proceeds thereof, in trust for the said Roman Catholic Archbishop of Westminster for the time being, to be distributed and given by him at his absolute discretion between such charitable, religious, or other societies, institutions, persons, or objects in connexion with the Roman Catholic faith in England as he should in his absolute discretion think fit. Cozens-Hardy M.R. said:—"This is an appeal from a decision of Swinfen Eady J., who has held that the gift of residue contained in the will of the testator is void for uncertainty. In my opinion it is impossible for us to differ from his decision. First of all there is a gift to the Roman Catholic Archbishop of Westminster for the time being, which is admittedly charitable. No question arises as to that. Then there is a gift of residue in trust for the said Roman Catholic Archbishop of Westminster for the time being. Stress has been laid upon the fact that the Roman Catholic Archbishop is the trustee who is to distribute this fund; and it is said that that fact alone is sufficient to show that the whole purpose is charitable. I am unable to accept that view. I do not doubt that if you find in a will words indicating that a distribution is to be made by persons in succession as holders of a particular religious or charitable office that goes far towards establishing the fact that the whole gift is charitable; but the mere fact that the trustee is a person holding a religious office, or is the head of a charitable institution, or even an incorporated institution, is not in any way sufficient to enable the Court to hold that all the trusts and purposes are charitable in the view of the law. I, therefore, do not think it is sufficient for the appellants' argument to say that the Roman Catholic Archbishop of Westminster is the trustee. But then it is said that the objects in whose favour

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the Roman Catholic Archbishop is directed to distribute this residue are objects in connexion with the Roman Catholic faith in England; and we are asked to hold that this is an over-riding intent which ought to have effect so given to it as to modify the natural meaning of the prior words, and induce us to construe them in a sense more restricted and narrow than we otherwise should. In the first place, I do not think that the words, 'in connexion with the Roman Catholic faith,' mean anything else than in connexion with the Roman Catholic Church, Roman Catholic Body, Roman Catholic Denomination, or whatever collocation of words you might use. But then it is said, if you find in a gift the words, 'the Roman Catholic faith,' you must assume that all the other words are to be read as that if they are connected with the Roman Catholic faith, they must also be charitable. I do not feel able to assent to that view, because in the language of this will there is an express direction that the residue may be distributed at the trustee's absolute discretion between such charitable, religious, or other societies, or institutions, persons, or objects in connexion with the Roman Catholic faith in England as he should in his absolute discretion think fit. In the face of these words it does seem to me impossible to say that it is not competent to the trustee, according to the express terms of this will, to apply the residue to societies, institutions, persons, or objects which are neither charitable nor religious. If this is so, there is an end of the case. I think that we are here dealing with what is very old and very well-established law. The leading authority cited in all these cases is *Morice* v. *The Bishop of Durham* (1). That has been upheld in the House of Lords in *Hunter* v. *The Attorney-General* (2)." He then refers to the judgment of Lord Davey, with which I have already dealt, and he goes on to say: "In the present case the testator has created a trust, but has not indicated any body of beneficiaries, any cestuis que trust, who can invoke the aid of the Court. The law is perfectly well established that the Court cannot recognize a trust which is so uncertain that there is no known means by which a trustee can be compelled to distribute that fund." Farwell L.J. said:—"It was argued that inasmuch as the gift is to the

(1) 9 Ves. 399; 10 Ves. 522. (2) [1899] A. C. 309.

Roman Catholic Archbishop of Westminster for the time being, that involved a gift not to an individual, but to an office, which was a religious office, and therefore, prima facie, charitable. In support of that argument *In re Garrard* (1), tried before Joyce J., and *In re White* (2), before the Court of Appeal, were cited, but to my mind the argument fails in its initial stage because the gift is not to the archbishop for the time being for the religious purposes of his archbishopric, but it is for what is actually specified immediately afterwards, namely, for distribution between such charitable, religious, or other societies, institutions, persons, or objects in connexion with the Roman Catholic faith in England as he shall in his absolute discretion think fit. It appears to me that when the testator has himself distinguished between charitable and religious societies, it is impossible for this Court to say that by religious societies he means only such as are charitable, and does not mean to extend the gift to the wider area. Joyce J. in *In re Garrard* (1), in my judgment, really proceeds on the same basis, namely, that the gift to the vicar and churchwardens for the time being of a parish, to be applied by them in such manner as they shall in their sole discretion think fit, was a charitable gift for the benefit of the parish for ecclesiastical purposes. He felt himself able under that will to cut down the generality of the expression in the gift to the form which would be appropriate to a gift for the benefit of the parish for ecclesiastical purposes. Whether that case was rightly or wrongly decided, that was the basis of the decision. To my mind, that does not touch a case like the present, where, as I say, the first step towards the argument does not arise at all. The case of *Thornber* v. *Wilson* (3) really depended upon similar considerations, but turned very much on the peculiar provisions of the will. The will there contained three separate devises, and then a gift of residue which the Vice-Chancellor construed, treating the will as a whole, by reference to one of the other gifts."

Religious "services," as was pointed out by Vice-Chancellor Wickens in *Cocks* v. *Manners* (4), can only be charitable so far

(1) [1907] 1 Ch. 382.
(2) [1893] 2 Ch. 41.
(3) 4 Dr. 350.
(4) L. R. 12 Eq. 574.

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as they tend towards the edification or instruction of the public, and he held that a gift to a Dominican convent was not charitable for that reason, although a gift to the Sisters of Charity of St. Paul was charitable; and, as Lord Justice Farwell points out, it was plain that the archbishop might apply the fund, or part of it, to some convent or community on a footing exactly similar to that which was held by the Vice-Chancellor in *Cocks* v. *Manners* (1) not to be charitable. Surely, apart from other methods of distribution of this legacy, His Holiness would be entitled to apply this fund to some convent or community or religious Order exactly similar to that which was held not to be charitable. In the case of *In re Davidson* (2) the purposes were specified as charitable, religious, or other. Lord Justice Farwell points out that, notwithstanding the addition of the words "in connexion with the Roman Catholic faith," there might be purposes open to the archbishop which were not charitable within the definition which had been judicially put upon the word, and if, as the Master of the Rolls says, the law is perfectly well established that the Court cannot recognize a trust which is so uncertain that there is no known means by which a trustee can be compelled to distribute the fund for charitable purposes, how am I to say in this case that the Court could compel His Holiness to so distribute this legacy?

In the case of *Dunne* v. *Byrne* (3) Lord Macnaghten in his judgment says:—"The Rev. Denis Joseph Byrne, Roman Catholic clergyman in charge of the Roman Catholic Mission at Dalby, in the State of Queensland, disposed by will of the residue of his estate in the following words:—'I will and bequeath that the residue of my estate shall be handed to the Roman Catholic Archbishop of Brisbane and his successors, to be used and expended wholly or in part as such archbishop may judge most conducive to the good of religion in this diocese.' Is that a good charitable bequest? In the Supreme Court of Queensland the full Court unanimously held that it was. The High Court of Australia by a majority of three Judges to two declared the bequest void. The learned counsel for the appellants began by insisting that, inasmuch as according to the authorities a gift to a Roman Catholic archbishop and his successors without more would be a

(1) L. R. 12 Eq. 574. (2) [1909] 1 Ch. 567. (3) [1912] A. C. 407.

good charitable gift, there is to be found in this will an overriding charitable intention sufficient to supply the lack of certainty, if lack of certainty there be, in the declared object of the bequest. Their Lordships have no hesitation in rejecting this argument." A similar argument was advanced and rejected in the Court of Appeal in England in the case of *In re Davidson* (1). It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee. On the other side it was contended that even if the trust declared be a charitable trust, the words 'wholly or in part' leave it uncertain how much of the subject-matter of the gift is impressed with the trust, because the trustee is authorized to apply part only of the residue to the purpose specified in the will. This argument was not accepted in the Supreme Court of Queensland, but it certainly found favour with some of the learned Judges in the High Court. It seems to their Lordships that on the true construction of the will the effect of the words in question is merely to give the trustee a discretionary authority to break in upon the capital of the trust fund. The fund is to be used—an expression which seems to imply that the capital is to be kept intact—and, if the trustee thinks fit, expended in whole or in part in promoting the object of the trust. Passing from these two points, we come to the real difficulty in the case. The fund is to be applied in such manner as the archbishop may judge most conducive to the good of religion in his diocese. It can hardly be disputed that a thing may be conducive to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the Court attaches to the word, and, indeed, without being in itself in any sense religious. In *Cocks* v. *Manners* (2) there is the well-known instance of the dedication of a fund to a purpose which a pious Roman Catholic would, no doubt, consider conducive to the good of religion, but which is certainly not charitable. In the present case the Lord Chief Justice suggested by way of example several modes in which the fund now in question might be employed so as to be conducive to the good of

(1) [1909] 1 Ch. 567.

(2) L. R. 12 Eq. 574.

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religion, though the mode of application in itself might have nothing of a religious character about it. As to what may be considered most conducive to the good of religion in the diocese of Brisbane, the archbishop is given an absolute and uncontrolled discretion. That being so, apart from a certain line of decisions cited at the bar, there would be an end of the case. The language of the bequest, to use Lord Langdale's words, would be open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution."

The testator in the present case has dedicated a fund to a purpose which, as a devout Roman Catholic, he, no doubt, considered conducive to the good of religion, namely, the carrying out of the sacred office of the Pope; but that does not prove that it was necessarily a charitable gift. Is the language of the bequest in Mr. Moore's will open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution? Might not the legacy, consistently with the will, be applied to other than strictly charitable purposes? If the answer to these two questions is Yes, then the bequest is void.

In *M'Loughlin* v. *Campbell* (2) the testator left all his real and personal property to the Rev. John Carroll and Daniel M'Loughlin, and he directed them to apply it "for such Roman Catholic purposes in the said parish of Coleraine or elsewhere as they may deem fit and proper." By a codicil the testator directed as follows:—"I confirm my said will; but, in the event of the disposition therein being held to be void for uncertainty, I bequeath the said residue to the Reverend John Carroll for such purposes in his said parish as he shall think right, including the improvement and maintenance of the Roman Catholic church there, and also the schools." By a further codicil he bequeathed to his executor £2,000 in trust for the establishment of a community of Christian Brothers in the parish of Coleraine for teaching purposes. The Christian Brothers were admittedly a monastic order. The Master of the Rolls said:—"Two questions arise for decision: first, is the gift of the property in the will good? If it is, the first codicil has no operation as to the residue. Consider the words which the testator has used—'for such Roman

(1) [1906] 1 I. R. 588.

Catholic purposes in the said parish of Coleraine or elsewhere as they may deem fit and proper.' The testator has used the words 'Roman Catholic purposes,' solely without introducing the word 'charitable' or 'religious,' and it is contended that the gift is void for want of some such word. It is a mere question of construction as to the meaning to be put upon these words. I went as far as any Judge has gone in *Arnott* v. *Arnott* (1), following *White* v. *White* (2), a case and authority which tends in favour of the view which I have always taken of endeavouring to carry out the intentions of the testator. What was decided in *White* v. *White* (2) was that the Courts had come by a process of interpretation to construe a gift in a will for religious purposes as a gift for such religious purposes as were charitable; in other words, introducing the word 'charitable' into the body of the gift. If I thought that this case applied here, I should follow it, and indeed I should be obliged to follow it; but that question does not arise here. There is no gift in terms for religious purposes. If there were, *White* v. *White* (2) would apply. If the gift is for purposes which may not be charitable so that the trustees could apply the whole of it for a purpose which was not charitable, the gift would fail. There are many Roman Catholic charities which are undoubtedly religious, as tending to the advancement or support of the Roman Catholic religion; for example, gifts for the endowment of a priest or curate; the building of a church, or the maintenance of it, or supplying it with proper appliances; schools, parochial houses, or presbyteries. Such things may possibly have been in the mind of the testator when he made his will. The words he used are 'such Roman Catholic purposes,' and if there are Roman Catholic purposes which are not charitable, the case comes into the principle of *Morice* v. *The Bishop of Durham* (3), and the gift fails for uncertainty. Several cases were suggested by way of illustration during the argument as showing that, though properly termed strictly Roman Catholic purposes, it could not be said that the words 'Roman Catholic purposes' necessarily involved purposes for the advancement or support of the worship or religion of the

(1) [1906] 1 I. R. 127. (2) [1893] 2 Ch. 41.
(3) 9 Ves. 399; 10 Ves. 521.

*Powell J.*
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Roman Catholic Church as such." He then referred to several instances suggested by Mr. Ronan, now Lord Justice Ronan, which might be Roman Catholic purposes, and yet not religious purposes, in which I find included a movement to raise a force like the Papal Zouaves for the protection of the Pope against Garibaldi. The Master of the Rolls then deals with the gift in the codicil to establish a community of Christian Brothers for teaching purposes. He referred to the argument of Mr. Molony, now Lord Chief Justice, in which the latter said there were two kinds of Christian Brothers in this country, the old Irish Christian Brothers, who were bound by monastic vows, and Christian Brothers who came from France some twenty-five years before, and established themselves in this country, but that he did not know whether they were bound by monastic vows. "This would involve an inquiry, the most favourable result of which would be that it might turn out that these French Christian Brothers were not bound by monastic vows. If such were the case, there would have to be a choice made by the trustees between the two sorts of Christian Brothers; but *Morice* v. *The Bishop of Durham* (1), and such cases, show that the whole thing would then be uncertain, and, therefore, the gift void. It is quite plain that, though teaching purposes are referred to, the trustee has power to use the money to purchase or rent a site or building for a school or residence for the Christian Brothers. That may mean Christian Brothers engaged in teaching; but then come the words 'or towards their support or maintenance.' These words can only mean the support and maintenance of the Christian Brothers. This gift then is illegal as well as uncertain, and the result is that the gift fails, and is not binding on the assets of the testator."

On the hearing of the appeal, which is reported at p. 594, the judgment of the Lord Chancellor, Sir Samuel Walker, is very short. He said:—"There are two rules which we must observe. In the first place, as this is a question of construction only, we cannot allow any extrinsic ideas of our own as to the intention of the testator to influence us in interpreting his will; and, secondly, there is a rule well settled since the time of Lord Eldon, that if upon the true construction of the will a bequest thereby given

(1). 9 Ves. 399; 10 Ves. 521.

could be applied, according to alternatives stated, to some purpose other than charitable purposes in the legal sense of the term, the gift is not a charitable gift. The way it was argued here was, that we ought to read this will as if the bequest were for the purposes of the Roman Catholic Church; but we cannot import into the will words which it does not contain. I do not express any opinion on the abstract question, whether if the gift were for religious purposes that would make it charitable. Some particular Order, for instance, might come within the terms of such a bequest, and yet not be a charity in the eye of the law. But these are not the words of the bequest here. It is a bequest for Roman Catholic purposes; and as the Master of the Rolls said, it might be applied for some purpose other than a charitable purpose; and, therefore, in principle, this case is ruled by *Morice* v. *The Bishop of Durham* (1)." Lord Justice FitzGibbon, in the course of his judgment, said:— "The question remains, whether the words which define the objects necessarily confine the testator's bounty to objects which come within the legal definition of charities. If not, and if the testator has in effect said, 'I leave it to the discretion of my trustees to give the money to objects which may or may not be charitable,' the gift is void for uncertainty, not because it might not be applied to religious, useful, or benevolent purposes, but that it might be expended upon objects not essentially charitable in the legal sense."

I think the present case is a fortiori. There is no provision in this bequest for a trust for Roman Catholic purposes; but assuming that all the purposes of the sacred office of the Pope are Roman Catholic purposes, yet if the bequest could be applied to some purpose other than a charitable purpose in the legal sense of the term—and I think it could—the gift as a whole is not a charitable gift.

In *The Attorney-General of New Zealand* v. *Brown* (2) the bequest was: "I direct and declare that the residue of the residuary trust funds into which shall fall all bequests and legacies that may have lapsed shall be held by my trustees in trust for such charitable, benevolent, religious, and educational institutions, societies, associations, and objects as they in their uncontrolled discretion

(1) 9 Ves. 399; 10 Ves. 521. (2) [1917] A. C. 393.

*Powell J.*
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shall select; and I leave it entirely to the discretion of my trustees to decide upon the amounts to be given and paid to any such institutions, societies, associations, and objects; and also, at their discretion, to decide whether to make periodical payments, or one single payment, to any such institutions, societies, associations, or objects."

The Court was Lord Buckmaster, Lord Parker of Waddington, and Sir Walter Phillimore. Lord Buckmaster said:—"It is obvious that the real obstacle that lies in the appellants' path is due to the word 'benevolent.' In accordance with a well-established series of authorities, beginning at least as early as *James* v. *Allen* (1), to which I have already referred, a gift for benevolent purposes is bad, because such purposes go beyond the legal definition of charities—a word which in the construction of wills has always possessed a limited and technical meaning. It is far too late to question the soundness of these authorities at the present day. It may well be that in the minds of people unversed in the subtlety of legal phrases, 'benevolent' and 'charitable' are equivalent terms; but in the Courts the meaning of 'charitable' has been recognized by the preamble of the statute; and charitable purposes have been regarded as those which that statute enumerates, or which, by analogy, are deemed within its spirit and intendment." He then refers to *Morice* v. *The Bishop of Durham* (2), and says:—"From this it follows that a gift for charitable or benevolent purposes is void for uncertainty, because it is impossible to divide the gift between the two objects, or to determine to which it should be given; and, consequently, the good cannot be separated from the bad, and the gift fails."

I am not entitled to question the soundness of the authorities on this point at the present day.

These authorities, including as they do decisions of Lord Eldon, Lord Hatherley, Sir William Grant, the Court of Appeal in Ireland, the Court of Appeal in England, and the House of Lords, are coercive upon this Court if the principles which they establish are applicable to the question which I have to determine. In my opinion they are applicable, and no desire to carry out the wishes of a testator can be allowed for a moment to influence a judge in

(1) 3 Mer. 17. (2) 9 Ves. 399; 10 Ves. 521.

deciding upon the validity or invalidity of a bequest in accordance with the principles of law as he understands them, and by which he is absolutely bound.

I think that on the authorities it is plain that where, as in this case, the objects of the trusts are stated in indefinite terms not capable of being controlled, and, if necessary, executed by the Court, the gift, not being necessarily applicable to charitable purposes as legally defined, and being applicable to purposes not only not charitable, but possibly illegal according to the laws of this country, is void.

The answer to the first question, therefore, will be that the legacy in question is a legacy to His Holiness the Pope upon a trust; and to the second question, that it is not a valid trust.

Solicitors for the executor: *W. P. Kelly & H. J. Walker.*
Solicitors for His Holiness the Pope: *A. O'Hagan & Son.*
Solicitor for the residuary legatees: *L. J. O'Neill.*

D. M. S.

*M. R.*
1919.
May 26.
June 16.

## In re M'COY, Deceased.
## COX *v.* MURRAY.
(1915. No. 835.)

*Income tax—Fund in Court—Five per Cent. War loan—Deduction of income tax.*

On the allocation of a fund in Court, representing the proceeds of the sale of five per cent. War Loan, a claim was made by the Commissioners of Inland Revenue for the payment of income tax accrued in respect of the income of the fund:

*Held*, that the deduction of income tax before distribution of the fund amongst the persons entitled would be a contravention of the terms upon which the five per cent. War Loan was issued, and that the proper procedure was to distribute the entire balance without deduction in respect of income tax, leaving it to the Commissioners of Inland Revenue to recover the tax (if any) payable by the persons entitled to the fund.

Summons for Allocation.

The funds to be allocated in this matter consisted of a sum of £1,855 0*s.* 10*d.*, the proceeds of the Sale of Five per Cent. War Loan, and the net amount available for distribution amongst the persons entitled under the will of the deceased was £1,150 5*s.* 2*d.* A claim was made by the Commissioners of Inland Revenue for the payment out of this latter sum of £52 13*s.* 8*d.* for income tax on the Five per Cent. War Loan which had been sold.

*Bewley*, for the plaintiff.

*G. W. Shannon*, for the Commissioners of Inland Revenue.

O'Connor M.R.:—

The funds in Court to the credit of this matter consist of a sum of £1,855 0*s.* 10*d.*, produced by the sale of Five per Cent. War Loan. Under the terms upon which these loans were issued the holder of these securities was entitled to have the entire

interest paid to him without any deduction in respect of income tax. That, of course, did not relieve the holder from liability to income tax. The sum he had invested in War Loan might be only a very small portion of his property; on the other hand, it might represent his entire property, and, if such were the case, his right was to receive the entire interest, without the necessity of having to claim a refund from the Inland Revenue. Up to the issue of Five per Cent. War Loan income tax on Government securities was deducted at source. This was convenient for the Inland Revenue authorities, though inconvenient for small investors. But when this War Loan was issued the inducement was held out to the public that the investor should be entitled to the entire interest in the first instance, and that the onus of proving his liability to income tax should be thrown upon the Inland Revenue. This was a great inducement, because, as everyone knows, once income tax has been paid there is a great delay in obtaining a refund, and expense has to be incurred by people who are not well acquainted with the provisions of the Income Tax Acts.

In the present case it appears that the persons entitled to the residue of the fund in Court are people of slender means. The income of the entire estate would not be liable to income tax, and it is divisible, after payment of debts and costs, among four legatees, the income of whose shares would not be liable to income tax unless they were possessed of other property. In my opinion it would be illegal and a violation of the terms upon which this War Loan was issued for me to order the payment of this sum for income tax out of the funds in Court. When the claim was mentioned to me, I asked the Commissioners of Inland Revenue to appear in support of their claim. They at first refused to come in and give the Court their assistance on a matter which I regard as one of difficulty and of very general importance; but they have now waived their claim at the Bar. That claim, if I were to accede to it, would have the effect of throwing upon the legatees in this case the obligation from which the very terms of the loan exempted them. They would have been put to the trouble and expense of having to consult solicitors or income tax recovery agents.

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Although I hold that the claim of the Commissioners of Inland Revenue in the present case is unsustainable, I am well aware of their difficulties, and of the fact that great losses are often incurred by the State owing to the impossibility of ascertaining people's incomes. It is to enable the Inland Revenue authorities to have this information that the Court has directed its officers in all cases of payments of the Five per Cent. War Loan to furnish the names and addresses of the payees to the Commissioners of Inland Revenue.

In my opinion this claim must be disallowed.

Solicitor for the plaintiff: *John Burke.*

Solicitor for the defendant: *Philip S. Smith.*

Solicitor for the Commissioners of Inland Revenue: *The Treasury Solicitor in Ireland.*

A. H. W.

M. R.
1919.
Jan. 20.
Appeal.
1919.
May 2, 13.
June 20.

## IN RE CONNOR, AN INFANT.

*Infant—Custody—Illegitimate child—Dead mother's wishes—Welfare of child.*

In the case of the father of a legitimate child, if he has not waived or forfeited his right by conduct, the Courts will allow his wishes to control the faith of the child, even after his death; but in the case of the mother of an illegitimate child, will only allow her wishes to control the faith of the child so long as she is living and her obligation to support the child remains.

Where the special facts nullify or negative the application of any rule of law or practice compelling the Court to yield to the wishes of a parent as to the religion of a child, the Court is bound to pay regard solely to the welfare of the child.

On the 6th April, 1911, M. C., a woman in humble circumstances, gave birth in a workhouse to an illegitimate daughter, who was baptized in accordance with the rites of the Roman Catholic Church, of which the mother was a member. On leaving the workhouse the mother and infant came to reside, at first as lodgers, in the house of S. and his wife, who were members of the Church of Ireland, and who carried on the business of stationers and newsagents, S. being also a teacher of music. The mother's health shortly afterwards broke down, and from that time to the date of her death on the 5th July, 1918, she and her child were voluntarily supported by S. and his wife. In the month of November, 1912, M. C. was received into the Church of Ireland, and her infant was at the same time baptized in that faith. Until a few hours before her death, M. C. remained a professing adherent of the Church of Ireland, and her child was brought up in the same faith; but on her death-bed the mother was visited by a priest of the Roman Catholic faith, who received her back into that Church, and who stated that she then expressed her earnest desire that her child should be brought up a Roman Catholic. S. and his wife were willing and anxious to adopt the child as their own. On the death of M. C. an application was brought by her mother K. C., who was also in very humble circumstances, seeking to be appointed as guardian of the child, and that the latter should be brought up in the communion and doctrines of the Roman Catholic Church. This application was refused by the Master of the Rolls, whereupon K. C. appealed to the Court of Appeal, an application being then made that a certain lady of position should be appointed as guardian of the infant, and the infant be sent to an institution to be brought up as a Roman Catholic.

*Held*, by the majority of the Court of Appeal (the Lord Chancellor and Ronan L.J., O'Connor L.J. dissenting), affirming the judgment of the Master of the Rolls, that the application should be refused, and that the infant should be allowed to remain in the care of S. and his wife.

*M. R.* 1919.

*In re* CONNOR.

This was an application for the appointment of the maternal grandmother of an illegitimate infant as its guardian, and also for an order that the infant should be brought up in the communion and doctrines of the Roman Catholic Church.

The facts were briefly as follows:—The mother gave birth to an illegitimate child on the 26th April, 1911. Within a few months after the event both mother and child were received into the house of a Mr. and Mrs. Strong, who kept a lodging-house at 32 Charlotte Street, Dublin, rented at £32 per annum, and, except for the space of a couple of months in the year 1918, continued to live with them till the mother's death, which took place on the 5th July, 1918. The mother had been brought up a Roman Catholic, and the child had been baptized a Roman Catholic. In November, 1912, being then living with Mr. and Mrs. Strong, the mother became a Protestant, and was received into the communion of the Church of Ireland at the Mission Church, Townsend Street, and the child was again baptized, this time as a Protestant. From the date of her reception into the Protestant Church down to her last illness the mother professed the Protestant faith by regular attendance at Divine Service and at several Protestant churches. During her last illness she was attended by a Protestant clergyman, and on the forenoon of the day preceding her death he administered Holy Communion to her. On that day or on the day of her death, 4th July, she was attended by a Roman Catholic priest, and received back into the Church in which she had been brought up; and on this occasion, as stated by the priest, she expressed her desire that the child should be brought up as a Roman Catholic. The child had for six years been trained and taught in the Protestant faith, and, in accordance with the mother's wishes, had regularly attended for over two years the Sunday school attached to St. Matthias' Church and the day school attached to Leeson Park Church, both Protestant churches, and was doing so up to the date of the present application. The Strongs lived alone, there being no child of the marriage, and were willing and anxious to adopt the child of Mary Connor in accordance, as they alleged, with her expressed wishes.

In an affidavit used on the hearing of the Appeal, Dr. Baxter stated that Mary Connor was suffering from pulmonary tuber-

culosis, and that on the 4th July she was dying, and that he did not consider her in a fit state, or as having the capacity, owing to bodily weakness and approaching death, to discuss religious questions.

M. R. 1919. In re O'NEILL.

*T. A. Finlay*, for applicant.
*John Leech K.C.*, for respondent.

O'CONNOR M.R.:—

This is a painful case, involving a contest for the custody of an illegitimate child, aged seven years, whose father is unknown and whose mother is dead. This child is at present in the custody of a Mr. and Mrs. Strong, who carry on a small business in the stationery trade at 32 Charlotte Street, Dublin. The maternal grandmother of the child resides in Higgins' Lane, Athy, where she makes her living as a charwoman. As the natural relation of the child she seeks to get her custody from people who are absolute strangers in blood. The case is not made less difficult to deal with by the circumstance that the parties on both sides are actuated by religious zeal, Mr. and Mrs. Strong wishing to bring up the child as a Protestant, while the grandmother wishes to have her brought up as a Roman Catholic.

The history of the case, which is a melancholy one, is this:— The mother was seduced by an unknown man, and gave birth to the child on the 26th April, 1911. Within a few months after the event both mother and child were received into the house of Mr. and Mrs. Strong, and, save for a short interval of a couple of months in 1918, continued to live with them till the mother's death, which took place on the 5th July in that year. Mr. and Mrs. Strong do not state the circumstances in which the mother and child were taken into or received in their house. Some accident may have brought them into contact, and the Strongs may have been moved merely by compassion for a poor woman in distress, or they may be people with missionary zeal, whose avocation is to seek out women who have fallen, with a view to regenerate them, or they may be the paid agents of some missionary society. For the purposes of my decision, I do not think it necessary to make any inquiry into this.

*M. R.* 1919. *In re* CONNOR.

The mother had been brought up a Roman Catholic, and was such when she went to Mr. and Mrs. Strong's house. The child had been baptized a Roman Catholic. In November, 1912, the mother, having been then in residence with Mr. and Mrs. Strong for about five months, became a Protestant, and was received into communion with the Church of Ireland at the Mission Church, Townsend Street, and the child was again baptized as a Protestant.

From the date of her reception into the Protestant Church down to her last illness the mother professed the Protestant religion by regular attendance at Divine Service in Protestant churches—the Mission Church in Townsend Street, St. Matthias' Church, and St. Kevin's (Protestant) Church. This is not contradicted. She also brought up her child as a Protestant or at least allowed her to be so brought up. This also is not contradicted.

The mother died in Mr. and Mrs. Strong's house on the 5th July, 1918, but she had left them, and remained away in Belfast for the space of two months in that year, after which she returned. Again the circumstances of her departure and return are left obscure, and I do not think it necessary to inquire into them. Perhaps the mother came back in bad health. She did not live very long after that event. During her last illness the mother was attended by a Protestant clergyman, who administered Holy Communion to her; but on the day preceding her death or on the day of her death she sent for a Roman Catholic priest, and was received back into the Church in which she was brought up, and of which she remained a member till she received the hospitality of the Strongs. This is the sad history of a life wrecked by the villainy of someone whose conscience I hope is now smitten. It is not for me to say whether or not this poor woman was ever sincerely and truly a Protestant. She may have been, but, as will be seen, this is not the question which this Court has to decide.

Mrs. Strong has sworn that the woman during her last illness expressed her desire that she and her husband should adopt and bring the child up as their own, and that she should continue to be brought up as a Protestant. I have no reason to doubt her statement; but the Rev. C. Murphy, the Roman Catholic priest who attended her in her last hours, has also sworn that she

expressed the wish that the child should be brought up in the Roman Catholic faith. I am sure that that statement is true. But the question is not whether the final wish is to prevail, however great the natural desire of any person would be to carry out the last dying wish of a parent. What the Court has to determine in a case like the present is: what is the best that can be done for the welfare of the child? But before going into this question I must notice the claim which has been urged on behalf of the grandmother, who is the natural relation of the child. No doubt, such a claim must have weight. The doctrine that an illegitimate child is filius nullius, with its rigorous logical conclusion that no one, not even a near blood relation, has any claim upon it, does not prevail in a Court of Equity. In *Reg.* v. *Nash* (1) it was said by Sir George Jessel that "in equity regard was always had to the mother, the putative father, and the relations on the mother's side." This statement was quoted with approval by Halsbury C. in *Barnardo* v. *M'Hugh* (2), where the right of the mother of an illegitimate child to its custody was recognized.

But the present is not a case of a putative father, or a mother applying for the child's custody. The application is made on behalf of the child's natural grandmother, who never had the custody of the child, and who can have none of that affection which is the result of intimate contact, care, and nurture. If ever there was a case in which the Court was left absolutely free to pay exclusive attention to the welfare of the child, it is this. Lindley L.J., in *In re Nevin, an Infant* (3), made this interlocutory observation: "The case is peculiar in this that there is no father, no mother, no guardian, no direction by the father as to the religious education of the child. What can we look to but the child's benefit?" The observation is singularly applicable to the present case.

I need not labour the point that the governing principle of my decision must be consideration of the child's welfare, and that alone. This has been established by a long series of decisions. Bearing this in mind, and not forgetting that in this Court all religions are equal, I approach the question, What ought

(1) 10 Q. B. D. 454. (2) [1891] A. C. 388.
(3) 1891] 2 Ch. 299, at p. 309.

M. R. 1919. In re CONNOR.

to be done in the present case? Here is a poor child, born in a very humble station of life, with no known father, no mother, and absolutely penniless. But she is not homeless, and not unprovided for. Mr. and Mrs. Strong gave shelter to the mother when she was in distress, in circumstances in which few could be found to extend such charity. They not only sheltered the mother, but also took in the child, and had them living with them until the death of the mother—a period covering about seven years. The child appears to have been well looked after, and her education has been attended to. There is no evidence as to how she was maintained or clad; but there is no suggestion of ill-treatment or neglect, and I have no doubt that the child shared in all the comforts of Mr. and Mrs. Strong's home.

Now it is sought to remove the child from their custody. The applicant is the natural maternal grandmother, and no doubt nature has given her a claim which commands respect. But what the Court has to consider is the welfare—material and moral—of the child. Would it be for her advantage to remove her from her present home, and commit her to the home of the applicant? I have no reason to think that she is not a respectable woman, or that she would not conscientiously discharge her duty to the child so far as her circumstances would allow; but I have to consider her station in life, her means, her home and surroundings. She lives in Higgins' Lane, Athy. She gets her daily bread by following the humble occupation of a charwoman. I do not for a moment suggest that because she fills such a lowly position her feelings are to be ignored, or that she deserves any slight. But I have to ask myself what are the opportunities offered by the poor home which she must have, and by the daily life which she must live, to a child committed to her care. The life of a charwoman is away from her own poor home. Her daily task is in other people's houses. She departs early—she comes home late, and then weary with her day's work. How can a woman in such a position bestow any care upon a child? Obviously she cannot; and there is no proposition that the child would be boarded at a convent school or any other institution. In the circumstances, not only am I not satisfied that the life of the child would be made more happy or profitable by the proposed change,

but I am convinced that the proposed move from the comparatively genteel and comfortable surroundings of a stationer's shop in Dublin to the very humble house of a charwoman would not be for the advantage of the child, either physically or morally.

*M. R.* 1919. *In re* CONNOR

I cannot give any consideration at all to the very laudable desire of the applicant to bring the child up in her own religion. She has no rights in this respect at all, and I have to deal with the case as if one religion were as good as another. But I must conclude by saying this, that if the choice of religions were in the forefront of this case—if I had to consider whether the moral welfare of the child depended upon a continuance of her education in the Protestant religion, which her mother assented to, or undoing all that has been done in such a course of training, and now converting her to the Roman Catholic religion—treating both religions as equal in the eyes of the law—I would feel bound to hold that it would be most undesirable in the child's interest to effect the change. The faith of a little child is very simple—very primitive, but is none the less sincere and unquestioning. I cannot see how her spiritual welfare is to be made better by robbing her of her child-like belief.

R. R.

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May 2, 13. June 20.

Kate Connor, the maternal grandmother of the infant, appealed to the Court of Appeal (1). The notice of appeal asked, inter alia, for an order that the said Kate Connor, or some other proper person, might be appointed the guardian of the person of the infant during her minority, or until further order; and in an affidavit of the said Kate Connor (which with other affidavits not before the Master of the Rolls was by leave of the Court read on the hearing of the appeal) a consent was exhibited by which a lady of position in Dublin agreed to become guardian of the infant should the Court of Appeal see fit to appoint her as such. It also appeared that arrangements had been made by this lady under which, if she was appointed guardian, the infant would be received into the home of the Nuns of the Sacred Heart,

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L. JJ.

*Appeal.* 1919. *In re* Connor.

Drumcondra Road, Dublin, to be there maintained and educated, in place of being sent to reside with her maternal grandmother.

*P. Lynch K.C.*, *Carrigan K.C.*, and *Finlay*, for the appellant.
*Leech K.C.*, *Wylie K.C.*, and *H. Hughes*, for the respondents.
*Cur. adv. vult.*

Sir James Campbell C.:—

This is an appeal from the decision of the Master of the Rolls in reference to a minor who is not possessed of or entitled to one shilling of property, so that the Court is powerless to give any direction or to make any provision for its maintenance or education, its jurisdiction being limited to the question of custody alone. In such cases it has been repeatedly affirmed that the Court of first instance will not be overruled in the exercise of its undoubted discretion unless the Court on appeal is satisfied there has been some clear misapprehension of fact or misapplication of law: *In re Kaye* (1). The facts are of somewhat an unusual character, and I shall summarize in the first instance the matters relied upon by the parties on both sides at the time when the application was heard and disposed of by the Master of the Rolls. A young woman named Mary Connor gave birth on April 6th, 1911, in the South Dublin Union Workhouse to an illegitimate daughter, who on the 1st May following was baptized under the name of Josephine Connor, in accordance with the rites of the Roman Catholic Church, of which the mother up to that time had always been a member. After leaving the workhouse the mother with her infant came to lodge with the respondents on 1st June, 1911, and remained with them until her death in the early morning of 5th July, 1918, a period of over seven years. In November, 1912, she was publicly received into the Protestant Church, and at the same time had her infant re-baptized in the same faith, under the name of Mary Josephine, and from that date until at least a few hours prior to her death she acted by every outward and visible manifestation as a regular worshipper and devout adherent of the Church of Ireland. Further, by her active procurement the child was throughout the entire of this period of six years trained and

(1) L. R. 1 Ch. 387.

taught in the same faith, and for at least two years before the mother's death regularly attended the Sunday School of St. Matthias' Church, and the Day School of Leeson Park Church. It was also alleged by both respondents that during her last illness the mother expressed to them her anxious desire that they would adopt the child as their own and continue to bring her up in the Protestant religion, while, upon the other hand, it was asserted that shortly before her death she was received into the Roman Catholic Church by the Rev. Charles Murphy of St. Kevin's Chapel, Harrington Street, and that on the same occasion she expressed to him her wish to have the child brought up in the same religion.

The mother having died on the 5th July, 1918, an application was made to the Master of the Rolls in the name of her mother, Mrs. Kate Connor, seeking to have the child removed from the custody of the Strongs and handed over to her in order that she should be brought up in the Roman Catholic religion. In her affidavit before the Master of the Rolls she was silent as to her means and occupation, and her description as a charwoman in an affidavit by the respondents was apparently not challenged, and was accepted by the Court; and it now appears by her subsequent admission that while presumably a respectable woman of good character she is living in very humble circumstances and surroundings, occupying at a weekly rent of 1*s.* 6*d.* a small artisan's dwelling in a lane at Athy. She has had no occupation in recent years beyond casual employment for a few days in out-door nursing, and is practically dependent on the precarious bounty of two sons. The Strongs, upon the other hand, occupy a house in a respectable street in the city of Dublin of the annual value of £18½ and for which they pay an annual rent of £32. Upon these premises they carry on the business of stationers and newsagents, Mr. Strong, in addition, being engaged in the teaching of music They live alone, there being no child of their marriage, and are willing and anxious to adopt the child of Mary Connor in accordance, as they allege, with her expressed wish; and no attempt has been made to refute or challenge their evidence that for the seven years they played the part of the good Samaritan to both mother and child, and that the latter is happy and contented with them,

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actually bearing their name, and regarding them and being treated by them in every respect as if they were her natural parents.

The Master of the Rolls in refusing to change the custody of the child decided that it would not be for the physical or moral welfare of the child to remove her from the comfortable and happy home which the Strongs had provided for her from her infancy, and were still willing and anxious to provide, to the atmosphere and surroundings of a lane in Athy. He also held that Mrs. Kate Connor had no rights in respect of the child's religion, and that, for the purpose of his duty, he was bound to regard one religion as being as good as another, and that in any event, in view of her previous training and teaching in the Protestant religion, it would be most undesirable in the interest of the child to effect a change. In my opinion the Master of the Rolls, upon the case as presented before him, exercised a wise and proper discretion, and acted in obedience to well-settled principle in holding that the dominating consideration was the welfare of the child, and that he could not remove it from the custody of people who for seven years had given a home to mother and child, housing, clothing, and feeding both at their own expense, in order to transfer it to the care and custody of a woman living in the humblest circumstances in a lane in Athy, who had left her daughter to take refuge in the workhouse in the hour of her ordeal and shame, and from that hour until her death seven years later had never contributed one shilling towards the support of mother or child, had never even visited her daughter or ever even once seen the child, leaving both absolutely dependent on the mercy and charity of the Strongs. The propriety of this decision by the Master of the Rolls has, in my opinion, been greatly fortified by the developments of this case since it left his Court, and by the further and material evidence supplied, as well as by the complete change of front on behalf of the appellant in practically abandoning the application for the transfer to her of the custody of the child, and asking instead for the appointment as its guardian of a lady of position and of well-known philanthropy, in order that it may be handed over to a charitable institution connected with the Roman Catholic Church.

In effect, therefore, this Court is faced with an application on behalf of a woman who, by the frank admission of her counsel, is

only a nominal party to the proceedings, and who, to do her justice, has not in either of her affidavits made the least pretence of the very slightest affection for her daughter's illegitimate child, or of interest in its material welfare, but asks for the custody in order the moment she has received it to transfer the child to the charity of an institution. Her sole and only object in this, as has been openly avowed at the Bar, is to further the purpose of others, absolute strangers to both mother and child, who through religious zeal would like to see this child brought up in the Roman Catholic faith, notwithstanding that its own mother, for every hour, until at least the very eve of death, of the seven years of life that she shared with her daughter consistently reared her in a different faith, while throughout that long period she was left to depend, for the existence of both, on the charity and bounty of strangers. And yet if ever an unfortunate girl stood in need of the love and care of a mother, or of the helping hand of charity or philanthropy, it was poor Mary Connor in the days of her shame and the seven anxious years that followed. She was of delicate health, a prey to the scourge of consumption, and deformed from curvature of the spine; and though for a few months she bravely fought by her own industry to maintain both herself and her child, health and strength broke down, and it was left to strangers like the Strongs to provide them with shelter and food for the remainder of her days. Counsel for the appellant have, however, in able and strenuous argument contended that they are entitled to succeed in this appeal upon the grounds—first, that it is proved that Mary Connor, upon her death-bed, expressed her desire to have her daughter brought up in the Roman Catholic faith; and second, that the Court, even though, as they admitted, it would not be any material advantage to have the child removed from its present custody, is bound, if not as a matter of law, at least in obedience to a well-settled practice, to give effect to this wish by transferring the custody of the child.

I put the question to Mr. Carrigan in the course of the argument whether he would have any case at all in the absence of satisfactory proof of the expression by the mother of such a wish, and he frankly answered in the negative. He was clearly right in making this admission, because, in my opinion, if there is

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any settled principle which governs the exercise of its discretion by a Court in applications such as this, it is that where the special facts nullify or negative the application of any rule of law or practice compelling the Court to yield to the wishes of a parent as to the religion of a child, the Court is bound wholly to disregard the competitive value of the different forms of religious belief, and solely to pay regard to the one and only consideration—the welfare of the child. It is essential, therefore, to determine at the outset whether the evidence in this case is of such a complete and satisfactory character as to establish that what is relied upon as an expression of her wish by Mary Connor was an act of volition by a person competent to appreciate its nature and effect; and I feel bound to say that after a careful and anxious scrutiny of all the affidavits in this case I am compelled to the conclusion that the evidence falls very short of being either satisfactory or sufficient. It is quite true that the Master of the Rolls in his judgment states that he accepted as true the evidence on this point; but the entire complexion of this part of the case has been altered by the further affidavits that have been used on this appeal. When the original affidavits of Mrs. Kate Connor and the Rev. Charles Murphy were first opened in this Court they undoubtedly left upon our minds the impression that the clergyman had regularly attended Mary Connor as her spiritual adviser throughout her last illness. Mrs. Connor's statement is that upon hearing of the illness of her daughter she had her visited by some of her children in Dublin, who brought Father Murphy to attend to her spiritual wants during her illness, while Father Murphy is even more specific in his statement that in his capacity as Roman Catholic clergyman he attended Mary Connor during her last illness in the month of June; but the further affidavits in the case have made it clear beyond question, and, in fact, it is now admitted that Father Murphy never saw this poor woman at any time in the month of June, and that, so far from attending her during her illness, he never saw her but on the one occasion only, namely, on the night of July 4th, a few hours before her death. It is also remarkable that in no one of the many affidavits that have been used in support of this application is there to be found the slightest reference to the mental or physical condition of Mary

Connor upon that night, and the only evidence on the subject is contained in the affidavits of Mrs. Strong and Dr. Baxter. Mrs. Strong is distinct and emphatic in her statement that at the time of Father Murphy's visit Mary Connor was actually dying, and from bodily weakness and lethargy in no condition to further resist the importunities to which she was subjected, that she was then so prostrate with illness and the approach of death that she took little or no interest in anything, and was virtually incapable of giving any directions regarding herself or her child, or of inviting or resisting the attendance of any person at her bedside. This evidence, which should naturally be discounted as coming from an interested party, is corroborated in every respect by the testimony of the doctor, whose impartiality or truthfulness has not been assailed in any particular. He describes the condition in which he found Mary Connor on the occasion of his visit upon that same day, the 4th July, at an hour antecedent to the visit of Father Murphy, in the following words:—"She was in a dying condition, sinking fast, and clearly near her death. She was suffering from pulmonary tuberculosis in its final stages, and in a state of great physical weakness and exhaustion"; and he told Mrs. Strong that the woman was dying, and that there was absolutely no hope of her recovery; and then he adds that her physical and mental condition was such that he did not consider her in a fit state, or having the capacity, owing to bodily weakness and approaching death, to discuss religious questions or resist spiritual or other influence, and that she had not then, nor could she subsequently have had, sufficient strength of mind to withdraw or directly change any disposition already made as to the child's future.

This evidence is, in my opinion, most strongly fortified by the statement of Mrs. Strong that for the three days immediately preceding the death of Mary Connor, her aunt, Mrs. Gahan, repeatedly pressed her to see a priest, but that she strenuously and persistently declined, especially as Mrs. Gahan, who, by her affidavit, states that she went into her niece's room just as Father Murphy was leaving it, but in time to overhear the expression of her wishes as to the future religion of the child, admits she was in the house throughout the three previous days, during which

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time I have little doubt that she did, as Mrs. Strong has sworn, and in discharge of what she would naturally believe to be her conscientious duty, use all her influence to persuade her niece to see a priest; and the failure of her efforts until the close of the third day, when, as the doctor has proved, Mary Connor's power of further resistance was broken down by the mental and physical prostration of the agony of death, is a very significant feature of this unpleasant case. It is also significant that, while Mrs. Strong swears that at this very time Mary Connor expressed to her a desire that she and her husband should bring up the child as their own, there is not one particle of evidence that at any time throughout the seven years, either to Father Murphy or to anyone else, did she express any wish to have her child removed from the care or custody of the Strongs, or give any direction as to its future worldly welfare, save what is deposed to by the Strongs, though no one can attribute to her at least any lack of maternal love or affection. I also attach very great importance to the fact that in the forenoon of that same day Mary Connor was, at her own request, and with full knowledge that her life on earth was drawing rapidly to a close, visited by a clergyman of St. Matthias's Church, which she and her child had attended, and partook with him of Holy Communion.

If, in all these circumstances, Father Murphy had, upon that night, been instrumental in procuring the execution of a will by Mary Connor, by which he was appointed guardian of the child, and directed to bring it up in his own faith, our law would require, before any Court could pronounce in favour of such an instrument, cogent and satisfactory proof that Mary Connor knew and approved of its contents, and this burthen of proof is intensified where, in a case like the present, what is relied upon is not a formal document, but a verbal communication by a person whose evidence by reason of her death is no longer available. I have not overlooked the uncontradicted testimony of Father Murphy that, upon the day following his interview with the deceased, he informed Mrs. Strong of the wishes expressed by her as to the religion of her child, and that Mrs. Strong made no objection or complaint; but she may well have thought it unseemly to enter into any such controversy or dispute upon such an occasion, when

the dead body of Mary Connor was still in the house, and it leaves untouched the independent testimony of the doctor.

But even if the evidence in support of the application had been upon this branch of the case as complete as it is defective, there would remain for consideration the effect that should be given, after her death, to the expression of such a wish by the mother of an illegitimate child. I have searched in vain for any case, and counsel for the appellant have admitted their inability to find one, in which, in the admitted circumstances of this case, any Court has ever declared itself bound to give effect to such a wish. It would be the merest waste of time to consider isolated decisions by particular judges as to the extent or origin of the rights in this respect of the mother of an illegitimate child prior to the decision of the House of Lords in *Barnardo* v. *M'Hugh* (1), in which it was held that the Courts will, in the exercise of their equitable jurisdiction, and in deference to the obligation imposed upon the mother to maintain her illegitimate child until the age of sixteen, primarily consider the desire of the mother as to its custody. Lord Herschell, whose judgment was adopted by Lord Field, and is, therefore, the judgment of the majority, was careful to add: "Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother, or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother"; while, on p. 397, in the same judgment, he states that he does not feel satisfied that the authorities established the proposition that the rights of the mother of an illegitimate child are the same as those which a father possesses with regard to his legitimate children. In view of the previous passage which I have quoted from this judgment, and which applies, as I understand the settled law on the subject, to the parents of legitimate children as well as to the mother of an illegitimate child, I am at a loss to conceive of any particular in which the law is different in the two cases, unless and except in this important and material point, that in the case of the father of a legitimate child, if he has not waived or forfeited his right

(1) [1891] A. C. 388.

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by conduct, the Courts will allow his wishes on religion to control the faith of the child, even after his death (religio sequitur patrem), but, in the case of the mother of an illegitimate child, will only do so so long as she is living, and the obligation to support the child remains.

In the subsequent case of *Humphrys* v. *Polak* (1), it was held, applying the authority of *Barnardo* v. *M'Hugh* (2), that as the mother of an illegitimate child has the duty imposed by law upon her to maintain it, she could not divest herself of this duty by any contract, and the following passage from the judgment in that case of Stirling L.J. is quoted in extenso in Simpson on Infants, 3rd edition, p. 121, and is very important:—"It is, I think, clear, from *Barnardo* v. *M'Hugh* (2), that the mother of an illegitimate child has by law imposed upon her obligations in respect of the child, and by reason of such obligations is vested by law with corresponding rights, one of which is the right prima facie to the custody and possession of the person of the child. That right is given to the mother, not for the benefit or gratification of the mother, still less as part of her property, but in order to enable her to discharge the duties which the law imposes on her in respect of the infant, and for its benefit." These words seem to me clearly and of necessity to involve the proposition that as these obligations are ended by the death of the mother, so also must it end the corresponding rights.

It has been suggested that the case of *Reg.* v. *Nash* (3) supports the proposition that this right, on the death of the mother, survives for the benefit of her relations. It is true that Jessel M.R. in the course of his judgment says that in equity regard was always had to the mother, the putative father, and the relations on the mother's side; but the head-note to the case merely regards it as dealing with the right of the mother, and Lord Herschell, in *Barnardo* v. *M'Hugh* (2), treats it as deciding this question only; nor is there any case that I have been able to find in which, after the death of the mother, regard was ever had to the wishes of her relations. They are under no obligation or duty to maintain her illegitimate child, and the principle, therefore, upon which *Barnardo* v.

(1) [1901] 2 K. B. 385. (2) [1891] A. C. 388.

(3) 10 Q. B. D. 454.

*M'Hugh* (1) and *Humphrys* v. *Polak* (2) were decided can have no application to them; cessante ratione cessat lex. In Halsbury's Laws of England, vol. ii, par. 749, p. 441, it is expressly stated that the rights and liabilities of the mother in respect of her illegitimate child are put an end to by her death, and the authority quoted for this proposition is the case of *In re Kerr* (3). Inasmuch as this was a decision by this Court, and consequently binding upon us, I am compelled to deal with it fully, because, as I understand the case, it is an express decision to the effect that, after the death of the mother, the Court is under no obligation to give effect to her wishes either as to the custody or the religion of her illegitimate child, but before doing so, I wish briefly to refer to *Barnardo* v. *M'Hugh* (1), which has been relied upon as an authority upon its facts in favour of this appeal. The mother in that case was a professing though indifferent member of the Roman Catholic Church, and had placed her illegitimate son in the care of Dr. Barnardo's institution; but, after he had been there for eighteen months, she demanded him back. The boy expressed an affection for his mother and a desire for the opportunity of frequently seeing her; and the Court, being of opinion that the mother had not by her conduct forfeited or waived her prima facie right to the custody of her son as the corollary to her obligation to maintain him, and the boy having an affection for his mother, and no injury being likely to result to his material welfare by the change, decided that she was entitled to have him restored to her. It would be difficult to conceive of a case in which the facts more essentially differed from those in the present case, in which the mother is dead, the child and the applicant complete strangers to each other, without the least particle of affection on either side, her residence with the Strongs, enduring, not for eighteen months but for seven years, and the avowed object of the applicant, who is under no obligation of maintenance, being not to remove her from a charitable institution, but to consign her thereto forthwith. In the case of *In re Kerr* (3), the mother of an illegitimate child which was born on the 7th November, 1881, was alleged shortly before her death, which occurred

(1) [1891] A. C. 388. (2) [1901] 2 K. B. 385.
(3) 24 L. R. Ir. 59.

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in November, 1887, the child being therefore only six years of age, to have handed it over to the care and custody of her brother, with an expression of her desire that he should retain it after her death; but subsequent to her death a Mrs. M'Gill, who was in no way related to either of the parents, finding the child, as she alleged, wandering on the streets, took possession of it, and handed it over to the custody of a Mrs. Martin, with whom it had resided for some years during the mother's lifetime. The putative father was desirous that it should remain in her custody, and, upon an application by the mother's brother for a writ of habeas corpus, it was held by the unanimous decision of this Court, consisting of Lord Ashbourne C., FitzGibbon L.J., Barry L.J., and Nash L.J., affirming the decision of the majority of the King's Bench Division, that, in the absence of special circumstances, the putative father is entitled after the mother's death to the custody of his illegitimate child as against a person claiming to have been appointed guardian by its mother. In the judgment of Gibson J. in the Court below, reported in 22 L. R. Ir., p. 642, he says, at p. 644:—"If the mother were alive, and it was a competition between her and the father as to the custody, the matter would be different; but she is not alive, and in my opinion she had no right to deal with its future custody, even if she desired to do so, and there is a conflict of evidence as to her wishes on the subject." As I have said, this judgment was adopted by FitzGibbon L.J. in the Court of Appeal, and no dissent from this proposition is to be found in the judgments of the other members of this Court; and Barry L.J. only qualifies it to the extent of saying that in a special case where with the consent of the putative father the child had, in accordance with the mother's wish, been brought up after her death by her relations, the father could not in such a case disturb the custody of the child.

A remarkable fact, which has a very important bearing upon the case before us, appears from the report of *In re Kerr* (1), namely, that the real object of the application was to control the future religion of the child, and that this controversy was dealt with by the affidavits on both sides. Since the arguments I have examined the original affidavits on the file, and find that it was

(1) 24 L. R. Ir. 59.

distinctly sworn by the applicant that his sister frequently expressed to him her wish that the child should be brought up in her religion. But this question is entirely ignored in all the judgments, save for the following observation, which concludes the judgment of FitzGibbon L.J.:—"The question of religion accounts for the litigation, but cannot affect the decision"—which I read as an express pronouncement that in the opinion of every member of both Courts the consideration in the case of an illegitimate child of the wishes or intentions of the mother as to the religion in which the child is to be brought up after her death cannot determine the question either of its custody or religion in the future.

I do not say, and for the purpose of this case it is not necessary to decide, that in a case where both parents of an illegitimate child are dead regard might not be had, to use the words of Jessel M.R. in *Reg.* v. *Nash* (1), to the wishes of the mother or of her surviving relations as to its custody or religion, everything else being equal; but as in such a case the obligation to support the child which is by law imposed upon the parents has determined and is not transferred to the relations of the mother, it is clear, upon the principle of the decisions in *Barnardo* v. *M'Hugh* (2) and *In re Kerr* (3), that they cannot and ought not to dictate our decision. But even had I been satisfied, as I am not, that the expression of her wishes, relied upon in this case, had ever been given by Mary Connor with intelligent appreciation and approval of its effect, and even though I was of opinion, which I am not, that the Court is under any obligation after the death of the mother to regard such expression as her prima facie right, I should still feel compelled, in obedience, as I believe, to settled authority, to disregard it in the light of her consistent conduct for seven years towards this child. Even in the case of the father of a legitimate child, it is firmly established that he may by conduct have lost or waived his right to control its religion, even during his lifetime; and he will not be allowed, as it is put in one of the cases, to play battledore and shuttlecock with the religious convictions of his child, even though of tender years. The authorities on this subject

(1) 10 Q. B. D. 454. (2) [1891] A. C. 388.
(3) 24 L. R. Ir. 59.

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are summarized in Simpson on Infants, 3rd ed., pp. 116-119. I shall only refer to a few. In *Hill* v. *Hill* (1), a case of the highest authority, approved of and applied by the Court of Appeal in *Andrews* v. *Salt* (2), the father, a Roman Catholic, died, leaving two daughters, aged seven and two years, and by his will he directed them to be brought up as Roman Catholics, and appointed his wife, a Protestant, and a Mr. Proctor, a Roman Catholic, to be their guardians. The eldest child had been privately baptized by a Roman Catholic priest in the absence of the mother, but was subsequently re-baptized in a Protestant church in the presence of the father. This child was never taken to any Roman Catholic place of worship, nor did the father ever attempt to control her religious education, but procured a Protestant governess for her at the age of six. The second child was baptized openly in the Church of England. In that case there was no dispute as to the prima facie right of the father to control the custody or religion of his children after his death; and the expression of his wishes did not depend for proof upon verbal testimony of a conflicting character, but was contained in a last will, admittedly duly executed by a competent testator, yet the Court, having regard to the welfare of the children, ignored the directions of the father, and held that he had forfeited his right as the result of conduct which in comparison with that of Mary Connor towards her child was of the most casual kind, more especially in the case of the daughter aged two years. For forty years this decision has stood without challenge or question, and as it completely covers this case, I shall respectfully follow it. In the later case of *In re M'Grath* (*Infants*) (3), the Court of Appeal, in very similar circumstances, declined in the case of five children of a Roman Catholic father, the youngest of whom was a boy of the age of six, to remove from the guardianship, after the father's death, a Protestant lady appointed by the mother, and refused, although the guardian avowed her intention to bring them up in her own faith, to give any directions as to their religious education. No charge of any kind was made against the guardian, just as in this case none has been made against the Strongs, and the avowed object of the

(1) 31 L. J. Ch. 505. (2) L. R. 8 Ch. 622.

(3) [1893] 1 Ch. 143.

application was, as now, to secure that the children should be brought up in the religion of their father. Lindley L.J., with him Bowen and A. L. Smith L.JJ., in delivering the judgment of the Court, deals at length with the principles of law which applied, but space must confine me to a few quotations only. On page 148 he says: "The law is not so rigid as to compel the Court to order children to be brought up in the religion of their deceased father, regardless of the consequences to themselves. This point was carefully considered by the present Lord Justice Kay in *In re Clarke* (1), and more recently by this Court in *In re Nevin* (2). *Hawksworth* v. *Hawksworth* (3), in which the duty of a guardian to bring up a child in its father's religion, and the duty of the Court to order this to be done, was most emphatically asserted, does not warrant the contention that there are no exceptions to this general rule; and the Court will always depart from the rule for sufficient reason. The welfare of the infant is the ultimate guide of the Court. See *Stourton* v. *Stourton* (4), *Andrews* v. *Salt* (5), and *In re Agar Ellis* (6). The right of the infant in this respect is the correlative of the duty of its guardians and of the Court."

Again, at p. 149, he says: "As regards the physical comfort and unsectarian education of the children, there is no ground whatever for the interference of the Court. The whole question turns on their religious education. Does their welfare demand that this should be now changed? This Court, judicially administering the law, cannot hold one religion to be better than another. The law does not impose upon the Court the duty of doing more than to order a child to be brought up in its father's religion, unless there are sufficient reasons for doing otherwise." He then points out that upon the facts the father, in his lifetime, had shown himself indifferent as to the religious education of his children, and proceeds, "Their mother's wishes are not relevant; although it is very painful so to hold. They were, however, clearly expressed in her lifetime in favour of the present Protestant guardian. Is the Court then driven by any rule of law to play

(1) 21 Ch. D. 817.
(2) [1891] 2 Ch. 299.
(3) L. R. 6 Ch. 542.
(4) 8 De G. M. & G. 760.
(5) L. R. 8 Ch. 622.
(6) 10 Ch. D. 49; 24 Ch. D. 317.

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battledore and shuttlecock with these children, and with their religious education? Is the Court bound to hold, contrary to its own inferences from the facts of the case, that it is for the welfare of these children that they shall be taken from the lady to whom they were entrusted by their mother, and by whom they have been and are all most kindly treated? Our answer again is, No. Our answer would be precisely the same if the father had been a Protestant and the guardian a Roman Catholic, who was bringing up the children as Roman Catholics."

Again I emphasize the fact that all that was relied upon in these cases as entitling the Court to disregard the directions of a father as to the future religion of his legitimate children was his indifference in his lifetime to their religious education. If mere indifference may suffice, how overwhelming is a case like the present, in which a mother, at the time when she was herself an open and avowed member of the Protestant church, had her child baptized within a year of its birth in the same faith, and from that hour until at least a few hours before her death—a period of seven years—systematically trained it in the same religion, had it taken regularly to Protestant churches, and for the last two years had it exclusively educated in Sunday and day schools connected with the same faith.

A very important case in its bearing on the nature and extent of the mother's claim to the custody of her illegitimate children and the circumstances under which the Court will disregard them is *In re Ullee* (1). An English woman had in 1870 gone through the ceremony of marriage in England with an Indian native prince, who at the time had two native wives still living. Four children, two boys and two girls, were born from their union, the father supplying them with a residence in England, and living with them until 1880. In that year he went through a ceremony of marriage with another English woman, whereupon the first lady ceased to live with him, and consented to her four children being sent to India to live with their father's people, believing that this change of residence was a necessary condition to their receiving certain money grants from the British Government. The father returned to India with the children, and died there four years

(1) 53 L. T. N. S. 711.

later, in 1884, and by his will directed that all four children were to be brought up in the Mahommedan religion, the boys to be sent to England when ten years of age, to be educated there, and he appointed two Englishmen as guardians of the four. The two girls remained in the family harem in India, and it was stated that the youngest, aged only ten, was about to contract an Indian marriage. The mother applied for the custody of the children, alleging that her marriage was invalid, and that as the children were illegitimate she had a right to their custody. Chitty J., after referring to the authorities, including *Reg.* v. *Nash* (1), says: "The case then, as put in the most favourable manner for the mother, was as to what was the best discretion the Court could exercise on behalf of illegitimate infants. The discretion is a judicial discretion, which considers what is best for the worldly welfare of the infant. As regards differences of religion, the Court stands neuter, and without religious conviction. The leading principle is what, apart from natural claims, is for the infant's interest?" He then goes on to state that the mother waived her claims in the father's lifetime by handing over to him the control of the education and religion of the children, and that her claims did not revive upon his death, and her application must be refused. This decision was affirmed. Similar decisions could be multiplied. Suffice it to say that I have not found in the literature of our law any case even of a father of a legitimate child who had so acted in his lifetime towards it as her mother did to her child in this case, in which his direction that after his death it should be brought up in a different religion, has ever been given effect to by any Court in the exercise of its equitable jurisdiction over infants. We are therefore, in my opinion, wholly unfettered in our consideration of this case by any obligation to regard the alleged dying declaration of the mother, and must decide it by regard only to the welfare of the child; and, so regarded, our duty seems plainly marked out by unquestionable authority. The example of Lindley L.J., in quoting and adopting from the judgment of Turner L.J. in *Stourton* v. *Stourton* (2) the proposition that the first and paramount duty of the Court is unquestionably to consult the well-being of the infant, was followed by Lord

(1) 10 Q. B. D. 454. (2) 8 De G. M. & G. 760.

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Cozens-Hardy and Farwell L.J. in the case of *In re W. W.* v. *M.* (1), in which the former also cites with approval the passage I have quoted from the judgment of Lindley L.J., beginning with the words "the dominant matter for the consideration of the Court is the welfare of the child." Similarly, in the case of *In re O'Hara* (2) FitzGibbon L.J. says in reference to the prima facie right of the parent of a legitimate child to its custody that it may be disregarded "where special disturbing elements exist, which involve the risk of moral or material injury to the child, such as the disturbance of religious convictions or of settled affections"; and later on he adds:—"The Court, acting as a wise parent, is not bound to sacrifice the child's welfare to the fetish of parental authority, by forcing it from a happy and comfortable home to share the fortunes of a parent who cannot keep a roof over its head or provide it with the necessaries of life."

I shall refer to only one other case in this connexion, the most recent I have been able to find, and probably the most important by reason of its resemblance in its facts to the present case, and of a singularly lucid judgment by Gibson J., containing an admirable exposition of the law. It is the case of *In re Story* (3), in which the father of two legitimate children ceased, owing to domestic differences, to reside with his wife, but left the children to her care and custody, and she educated them in a different religion from his own. The father drifted into the workhouse, but having secured an undertaking from a charitable association of his own faith to maintain and educate his children, he applied in the King's Bench Division for their custody, their ages being then eleven and eight years respectively. The Court, consisting of Cherry C.J., Gibson J., and Dodd J., unanimously refused his application, in regard for the welfare of the children; Gibson J., in the judgment to which I have already referred, stating that "much depends on the intelligence and spiritual instincts of the individual child; and, without mastering the details of the doctrinal controversy which divides the Churches, he may have imbibed enough from his mother, his prayers and catechism, to make it painful and dangerous to force upon him instruction on the basis that

(1) [1907] 2 Ch. D. 557. (2) [1900] 2 I. R. 232.
(3) [1916] 2 I. R. 328.

hitherto his life had been spent, under his mother's teaching, in dangerous error."

Following loyally this consensus of the highest authority, I decide without hesitation that it would not be for the welfare of Mary Josephine Connor to remove her from the comfortable and happy home in which by the active procurement of her mother she has lived for the eight years of her life, and where, as has not been questioned or denied, she has received and returned the affection of the people who came to the rescue of both mother and child in the years of their direst distress, in order that she should be consigned, as Ronan L.J. has tersely expressed it, as a pauper and a bastard to the charity of a benevolent institution where her sad history must inevitably become known and expose her to constant mortification and shame. I fear I have unduly elaborated this case, but I have done so from a sincere desire that, so far as this Court can control it, the decisions should consistently and uniformly comply with settled principles and subsisting authorities, otherwise our duty in cases of this description, always uncongenial, must become positively distasteful if we are left with no safer guide than our individual convictions. To-day, this duty compels us, in my opinion, to decide that this child shall continue in its present custody, and as a consequence be brought up in the Protestant religion; to-morrow, the application of the same principles may compel us in the discharge of the same duty to direct in the case of another child that it shall be brought up in the Roman Catholic religion; but the one thing that we cannot do is to consider any one form of religion as better than another. To some pious people this may seem a hard saying; but it is unquestionably the law, and the only alternative would be unthinkable, of leaving the decision of such cases to depend upon the personal convictions of a fluctuating Court.

In coming to a decision in this case I have fully recognized that in the case of a child of eight years the Court will not necessarily allow the right of a parent, in the absence of indifference or direct intervention, to control the religion of his child, to be disregarded on the plea of settled convictions; but the cases I have cited are the amplest authority for another and different proposition, namely, that when this right of the parent has been

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waived by conduct or lost by death, the Court will not allow the fervour of competing religions to play fast and loose with the early impressions of a child, even of the most tender years, or loosen the ties of love and affection resulting from the position in which the parent has placed the child, or allowed it to remain.

I cannot omit one other consideration which forcibly illustrates the extraordinary position in which this child may possibly be placed if we were to yield to the present application. It was decided in this country, in *Re Crowe* (1), that on the death of the mother of an illegitimate child the putative father had a prima facie right to its custody in view of his legal obligation to maintain it, and, as the decision in that case was approved of and adopted in *In re Kerr* (2) by this Court, it is plainly binding upon us. In the present case the applicant, Mrs. Kate Connor, swore in her original affidavit that at the time of the birth of her daughter's infant she was unable, and has since been unable, to ascertain the name or whereabouts of the father; but it is now plain that her evidence in this respect was false, as a telegram has been disclosed, signed by her, and addressed to her daughter in 1915 as Mrs. D., the name of the man who is proved beyond question to have been the father of her child. Mary Connor so described herself to the Strongs when she first came to live with them, all the letters she received were similarly addressed, while the man himself for some years wrote to her as his wife, admitting the paternity of the child, and sending small sums of money for their support. In the year 1913 he must have contemplated the making of amends by marrying the girl he had betrayed, because in that year Mary Connor procured a marriage licence from the Registrar to enable her to be married to this man in a Protestant church; but apparently he changed his mind, and in 1914 he rejoined the army, and when last heard of by the Strongs was serving in France. He is proved to be a Protestant, and if he were to appear upon the scene, as it is at least possible he may, and claim the custody of this child for himself, or ask to have it restored to the Strongs, the Court would find it very difficult, in the absence at least of evidence of his unfitness, to refuse his request, so that if we were now to hand it over to a Roman Catholic

(1) 17 I. L. T. 72. (2) 24 L. R. Ir. 59.

institution, it might be reclaimed a year or two hence by a Protestant father, to be once more trained and taught in the tenets of its earliest faith. I am glad that, so far at least as this Court can prevent it, Mary Josephine Connor is to be saved from this refinement of cruelty.

Finally, it has been urged that the Court has no power to compel the enforcement of the undertaking by the respondents to continue to bring up this child as their own. This is true; but it applies equally to the undertaking offered on the other side, and there are two obvious answers to it. In the first place, the conduct of the Strongs towards both mother and child for seven years is the best evidence of their sincerity and good faith; and, secondly, no order of the Court of Chancery in these cases is necessarily final, and further or different dispositions as to custody may be made from time to time on the application of any person who can satisfy the Court that the welfare of the child requires it.

RONAN L.J.:—

When this case came before the Master of the Rolls, the question was whether the child should be allowed to remain with the Strongs, or should be transferred to the custody of the maternal grandmother to be kept by her in the cottage which has been described. The case made by the applicant before the Master of the Rolls has now, however, been abandoned, and a new and entirely different case has been put forward in this Court, namely, that the child should not be sent to reside with her grandmother, but should be placed in a charitable institution. This Court is one, not of first instance, but of appeal, and we are entitled to know the opinion of the Court below on the case which comes before us on appeal. The case now made was never before the Master of the Rolls. I agree, however, that we should now adjudicate on the case on the materials before us, as our refusal to do so might only involve a fresh application.

In the first place, I wish to state that I entirely adopt every word the Lord Chancellor has said as to the facts of this case and as to the affidavits, and I have arrived at the same conclusion on the facts as he has done. I am of opinion that the clear inference to be drawn from the facts of the case is that

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this poor woman never had any wish that her child should be taken away from the custody of the Strongs, and I am further of opinion, for the reasons stated by the Lord Chancellor, that there is no satisfactory evidence of any wish of hers while of competent mind that the child should be brought up as a Roman Catholic. I entirely agree with the Lord Chancellor's analysis of the evidence, and but for the important question of law which has been argued, it would be unnecessary for me to add anything. As to the law, I also agree with his judgment, and my observations are intended to be supplementary to it.

If it were proposed to take the child from the Strongs and place her in a Protestant charitable institution for destitute children, would any Court say that it was for the benefit of the child that this should be done? Further, is there the slightest ground for thinking that the poor mother would have wished this to be done? Apart from the religious element in the case, the removal of this child from the kindly care of the Strongs would, in my judgment, amount to what was described by Chitty J. in *Re Nevin* (1) as "unnecessary cruelty."

The applicant's case, therefore, entirely depends on the religious element, the question of religion being whether the child should be brought up as a Catholic or as a Protestant.

The fundamental principle to be considered in minor matters is the welfare of the minor. In *Re Grimes* (2), Ball C. says: "Of religious systems, how far true, how far in error it (the Court) pronounces nothing; it neither favours nor condemns any; and views the claims and rights of all with perfect impartiality." Therefore, we are bound to treat the Catholic and Protestant religions as equally beneficial to the minor. We are prohibited from considering the respective merits of the two religions, and therefore from saying that as between the two religions, as such, it is more for the welfare of the minor that he should be brought up in one of them than in the other.

Honest, earnest members of each religion, on the other hand, believe that this is a matter of transcendent importance in considering the welfare of the minor, and that his eternal welfare will be materially affected by the choice of the religion in which he is to

(1) [1891] 2 Ch. 299. (2) I. R. 11 Eq. 465, at p. 470.

be brought up; as ninety-nine people out of every hundred remain in the religion in which they were brought up, they think it of vital importance that it should be the true one, viz., their own.

The Courts, however, regard it as a matter of great importance that a child should be brought up in some religion. It is obvious that for this purpose the child must be taught dogmatically that the religion in question is true. The child must soon learn that there are other religions, but must be taught that its own is the true one. The religious belief of a child is not the result of a consideration of arguments as to which is the true religion. Lord O'Hagan describes it in *In re Meades, Minors* (1), as "the simple, cloudless confidence of childhood, adhering joyously to religious truth as expounded and made clear to it by loving parents." By "religious truth" Lord O'Hagan here means, of course, the religion of the parents, whatever it is. In *F.* v. *F.* (2) Farwell J. said:—"One of the first and most sacred duties of the parents is to imbue the mind of the child with *some* religious belief," quoted by O'Brien C.J. in *Re Grey* (3). These convictions grow stronger as the child gets older, and ultimately become settled convictions, which generally last for life. They are described by members of one Church as "the happy result of childlike faith," and by members of the opposition Church as "the unhappy result of childish credulity." But by whatever name they are described, the Courts hold that it is of vital importance that they should not be disturbed by controversy, "the result of which may be to unsettle the foundations of belief in the mind, and substitute a scepticism fatal to the existence of any religious faith whatever": per Ball C.: *Re Grimes* (4).

The authorities are practically all cases where the question was whether in the circumstances the Court should interfere with the prima facie right of the father or mother on the ground that it is necessary to do so for the welfare of the child. The person in whom the prima facie right was alleged to exist was either the father or mother of a legitimate child or the living mother of an illegitimate child. No case has been produced in which it was alleged that there was any prima facie right in persons designated

(1) I. R. 5 Eq. 98.
(2) [1902] 1 Ch. 688.
(3) [1902] 2 I. R. 684, at p. 689.
(4) I. R. 11 Eq. 465, at p. 471.

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by a deceased mother of an illegitimate child, or any prima facie obligation on the Court to obey her wishes.

The position of the parents of legitimate children is this: The father's position was unique. He was the sole absolute master. He could dictate the custody and religion of the child during his life and after his death. His wishes were prima facie conclusive, and it was the sacred duty of the Court to give effect to them after his death. After the death of the father the mother had a common-law right to the custody of children of tender years as natural guardian, but she had no right to direct the custody of the children after her death; and even during her life if the father had appointed a testamentary guardian, his power would prevail over the mother's right. But the mother had no power to provide for the custody of the children after her death. Sect. 3 of the Act of 1886 enabled her for the first time to appoint a guardian after her death: see per Rigby L.J. in *Re A and B* (1).

In the case of illegitimate children the position is this: "Nor is there at common law any personal obligation on the mother to maintain her bastard child. No authority for it has been cited, and there is no legal principle on which it can rest," per Blackburn J. in *Ruttinger* v. *Temple* (2). The poor law imposed a statutory obligation, but this only lasted during the mother's life, if so long. In *Humphrys* v. *Polak* (3) Stirling L.J. says:—"It is, I think, clear from *Barnardo* v. *M'Hugh* (4) that the mother of an illegitimate child has by law imposed on her obligations in respect of the child, and by reason of such obligations is vested by law with corresponding rights, one of which is the prima facie right to the custody and possession of the person of the child. That right is given to the mother . . . in order to enable her to discharge the duties which the law imposes on her in respect of the infant." No case has suggested that she had any power of directing the custody or religion of the child after her death. After the death of the mother the father of an illegitimate child is, as far as I know, the only person having any legal right to its custody. Practically all the religious cases have been on the question whether the Court should interfere with the

(1) [1897] 1 Ch. 786, at p. 793.
(2) 4 B. & S. 491, at p. 496.
(3) [1901] 2 K. B. 385, at p. 389.
(4) [1891] A. C. 388.

prima facie right of the person entitled by law to the custody or entitled by law to prescribe the custody of the child after his or her death. This question would to some extent arise in the present case if the father of the minor was the applicant. He is the only person having any legal right to the custody of the minor. Here the applicant has no right whatever.

In *Barnardo's Case* (1) the question was whether the Court would interfere with the legal right of the living mother to the custody of the child; in *Story's Case* (2) it was whether the Court would override the legal right of the living legitimate father. In cases of this class definite principles apply regulating the duty of the Court in considering whether they will interfere with specific rights of certain persons. If the present case were an application by the living mother for the custody of her child, considerations similar to those in *Barnardo's Case* (1) would arise.

*Re Nevin* (3) is one of the cases referred to by the Master of the Rolls. There the father, a Protestant, married a Catholic, and died when the child in question was three years old. He had signed an agreement that the children should be brought up as Catholics, and he had the child publicly baptized as a Catholic. The father died in the house of a Miss Martin, a cousin of his wife; and the wife subsequently died, having appointed no guardian. On an application by a brother of the wife for the custody of the child, Chitty J., in the passage to which I have already referred, stated that it would be an "unnecessary cruelty to the child to drag her away from Miss Martin . . . and to hand her over to strangers, in order that she may be brought up as a Catholic." Lindley L.J. (at p. 312) said: "The child in the father's lifetime was left in the care of the kindest person whom the parents knew, and is it for the child's benefit that she should now be removed from that care? I say, No."

In *In re Kaye* (4), which was a case prior to the Act of 1886, the mother had appointed testamentary guardians of the children, which, although she had no legal power to do so, was regarded as an important circumstance by the Court. Turner L.J. there

(1) [1891] A. C. 388.
(2) [1916] 2 I. R. 328.
(3) [1891] 2 Ch. 299.
(4) L. R. 1 Ch. App. 387.

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said: " . . . although a mother has no legal power to appoint guardians, still, where the father has expressed no wish, the Court will regard her wishes as deserving of great attention." If this poor woman had been married, and, being a devout Catholic, had brought up her child in that faith, and if the father had allowed her to do that, the Court would, although she might have had no power to appoint a guardian, have paid great attention to her wishes, and perhaps have even overridden the wishes of the father.

But not to disregard the wishes of a party and to be bound to give effect to them are wholly different things, and the cases to which we have been referred, in which the Courts have considered whether the circumstances were such as to justify the disregarding of the wishes of those whose wishes prima facie ought to be given effect to, have no application to this case at all. The circumstance which I think is conclusive in the present case is that the welfare of the child demands that she should not be sent to a charitable institution. As Gibson J. said in *In re Story*, (1) " The substitution of charitable institutions for a loving home is undesirable." In *In re O'Hara* (2), Holmes L.J. said: " No doubt, the period during which a child has been in the care of the stranger is always an important element in considering what is best for the child's welfare. If a boy has been brought up from infancy by a person who has won his love and confidence, . . . separation from whom would break up all the associations of his life, no Court ought to sanction in his case a change of custody." But there is another circumstance in this case which seems to me of grave importance. No doubt in a case where a father has not abdicated his right, or acquiesced in his child's being brought up in another religion than his own, and when the child has not attained any settled religious convictions, the father's right to determine the child's religion would not be interfered with; but in the present case we have no person before us with a paramount right to the child. I have already referred to the sacred duty of teaching a child some religion. This little child has never been taught anything but the Protestant religion, either by her mother or by the Strongs, whom she regards as parents. Is that child now to be taken

(1) [1916] 2 I. R. 328, at p. 346. (2) [1908] 2 I. R. 346.

away from a happy home, and to be taught that what she learned at her mother's knee and from the Strongs, that what she heard at church, was false? This would be, in the language of Wickins V.-C., in *Re Hawksworth* (1), "to introduce her prematurely into an atmosphere of theological controversy, than which nothing can be more injurious to the mind and heart of a child." The undesirability of such a change in the life of a child is forcibly pointed out in *In re Story* (2) by Gibson J. (p. 347) and Dodd J. (p. 352). The applicant's case here is based on the proposition that the mother of an illegitimate child is to be regarded in law as having the same rights as the father of a legitimate child. During the argument I asked if anyone had ever even attempted to argue such a proposition, or if there was any hint or suggestion of the kind in any case or any text-book. Counsel replied in the negative. We are now asked to lay down this startling proposition for the first time. I wholly decline to do so. It is, in my opinion, entirely opposed to the whole history of the law on the subject.

I also agree with the Lord Chancellor that, even if this proposition were law, and we were satisfied that the mother had, while competent, expressed a clear, deliberate, final wish that the child should be brought up a Catholic, it would be the duty of this Court, having regard to the facts of this case, and the principles laid down in *Hill* v. *Hill* (3), *Re Nevin* (4), *Re Story* (2), *Re O'Hara* (5), *Re Hawksworth* (1), to refuse this application to remove this child from the Strongs, and place her as a bastard and a pauper in an asylum for destitute children.

O'CONNOR L.J.:—

The subject-matter of this litigation is the custody of an illegitimate child named Josephine Connor, who is now eight years of age, having been born on the 26th April, 1911. The contesting parties are Ellen Connor (the appellant), grandmother of the child, on the one hand, and Arthur F. Strong and his wife, Margaret Strong (the respondents), on the other.

(1) L. R. 6 Ch. App. 539, at p. 540.
(2) [1916] 2 I. R. 328.
(3) 31 L. J. Ch. 505.
(4) [1891] 2 Ch. 299.
(5) [1908] 2 I. R. 346.

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It appears that Mary Connor, the mother of the child, left her native town of Athy some time about the year 1909, and came to Dublin, where she was seduced by a man named William Dowty, of whom little was known for certain at any time beyond the fact that he is the father of the child Josephine Connor. It is stated that he was a Protestant. Nothing whatever is known of him now—not even whether he is alive.

Mary Connor was a Roman Catholic, and the child was baptized in that faith. How the mother and child came to know the Strongs, and the extent and nature of that acquaintanceship, we must learn almost entirely from the affidavits supplied by the Strongs themselves, the mother being dead, and the Strongs not having been cross-examined on their affidavits.

The Strongs keep a newsagent's shop at No. 32 Charlotte Street, Dublin, and they have a small furnished room upstairs, which they let for 4*s.* 6*d.* a week. They tell us that in June, 1911, the mother (who was accompanied by her sister on the occasion) applied for lodgings for herself and her child, representing that she was a married woman, whose husband, William Dowty, was in the Royal Engineers, and that she would require the lodgings for a couple of months only. The furnished room was accordingly let to Mary Connor, for the use of herself and her child, at 4*s.* 6*d.* a week. Dowty seems to have visited Mary Connor at Charlotte Street for some time; and I have no reason to doubt that, in the beginning, the Strongs did not suspect that Dowty was not Mary Connor's husband. Later, however, that is to say, in November, 1911, they became aware of the true state of affairs. After the first few months the rent of 4*s.* 6*d.* per week was seldom paid. Dowty seems to have made some insignificant payments—an occasional 3*s.* or 2*s.*—towards Mary Connor's keep, up to August, 1914. The woman herself was very delicate, and worked but on rare occasions, when her trifling wages went towards her own and her child's maintenance.

From a date, which is not fixed accurately, but which I infer was about the beginning of 1912, this mother and her illegitimate child were lodged, maintained, and clothed by the Strongs, substantially rent free, and substantially free of any charge whatever for maintenance or clothing. Mrs. Strong says in her affidavit

that during the whole of the seven years during which Mary Connor was with them, her husband and herself fed, clothed, and housed the mother and child entirely out of their own resources, except for the insignificant payments mentioned.

The next stage in the history of the case commences in 1912. In November of that year Mary Connor was received into the communion of the Church of Ireland, and the occasion was deemed of so much importance that the ceremony was performed publicly in Townsend Street. The child was baptized as a Protestant about the same time.

Now, in the light of the facts that, practically speaking, the entire support of the Connor family had been undertaken by the Strongs themselves from about the beginning of 1912, and that the leanings of the woman towards the Church of Ireland came soon after that date (because, of course, her public reception into that Church was, presumably, not the first manifestation thereof), we were asked to infer that the Strongs were the paid agents of a proselytizing society. I cannot act on that suggestion. There is not a particle of evidence of it. The Strongs could have been cross-examined before the Master of the Rolls. No application was made to cross-examine them. We must take their affidavits as we find them—not indeed that a Court is bound to swallow everything it finds in an affidavit, but it cannot draw inferences of fact wholly unsupported by what it finds there. But while I reject that suggestion, still I cannot shut my eyes altogether to the facts of this remarkable case, nor, when I enter this Court, can I lay aside my commonsense and such experience as I have of human nature.

The Strongs are themselves people in very humble circumstances—that appears from the fact that they were willing to take in a poor woman and her infant child at a rent of 4*s.* 6*d.* a week; they are not philanthropists—the fact and amount of the rent show that; the mother and child had no claim whatever on them—indeed, the Strongs had every reason to resent the mother's gaining access to their household by the false statement as to her marriage. What inference can any man of the world draw from this extraordinary exhibition of generosity, and from its synchronizing with the first manifestation of a leaning to her protectors'

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religion on the part of Mary Connor? What, save this—first, that the Strongs were impelled to their generosity by a desire—from their point of view quite a laudable desire—to make converts of the Connors; that that desire was manifested by pressure, not necessarily of an unfair kind, on Mary Connor; and secondly, that Mary Connor herself was actuated in her change of religious front by a wish either to show gratitude to the Strongs, or to obtain from them a continuance of their favours? These, I think, are not unfair inferences; indeed, to my mind, they are the only possible inferences. But the matter does not rest on inference. The Rev. Charles R. Murphy, the Roman Catholic clergyman who attended Mary Connor in her last illness, has made an affidavit in which he says:—"Mary Connor told me that for some years previous she had attended Protestant services and ceremonies. She said, however, that she had never been a sincere Protestant, and that Mrs. Strong had on several occasions asked her to attend Protestant ceremonies, and to please Mrs. Strong she had done so." I need scarcely say that no one can doubt that that conversation between the clergyman and Mary Connor occurred. Was Mary Connor then telling the truth? She was in her last illness; she had been given up by the doctor; she was at the most solemn and important moment of her life, and engaged in that which, to all people who believe in a hereafter, is the most solemn and important business of life. Naught but truth comes from the mint of such time and circumstance. The law itself attaches to dying statements the most extraordinary efficacy, and for the best of all possible reasons. As we know, persons accused of crime must be convicted, if they are to be convicted at all, not on hearsay uttered behind their back, but on sworn evidence adduced in face of them in a Court of Justice. And yet, in charges of murder and manslaughter, the law, which hedges round an accused person with so many safeguards, allows the dying declaration of the person killed to be given in evidence, even though such declaration is made neither on oath nor in the presence of the accused. The reason why such declarations are admissible in evidence is eloquently stated by Eyre C.B., in *R.* v. *Woodcock* (1):—"Now, the general principle on which this species of evidence is admitted is that

(1) 1 Leach 500, at p. 502.

they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice." Is not every word of that applicable to Mary Connor's dying statement, nay, doubly applicable, having regard to the person to whom, and the motive from which, she made it?

I asked Mr. Leech during the course of the argument would his clients be prepared to keep and adopt the child on the understanding that it was brought up a Roman Catholic? His answer ("I cannot say") was evasive; but I have no doubt that the Strongs would not be prepared to do anything of the kind. In this connexion, I refer to the uncontradicted affidavit of William D. Smyth, the solicitor's clerk who called upon Mrs. Strong to ask her for the child: "Mrs. Strong then asked me who was to pay her for supporting the late Mary Connor and the child? but, on my inquiring if she was simply demanding payment before giving up the child, she said that such was not the case. She said that the child should be brought up a Protestant." Accepting Mary Connor's dying statement as true, and recognizing that the real dispute in this case is about the religion of the child, I conclude that the Strongs are zealous people who were and are very willing to go to great lengths and expense, indeed, to induce other people to assume conformity with the tenets of the Strongs' own creed. I need hardly say that that conclusion by no means disposes of this case; it is only relevant on three points—1, it shows me that the allegations of the Strongs that they are influenced solely in their desire to keep the child by love of it, or desire for its material welfare, are subject to a mighty discount; 2, it has an important bearing on the suggestion that Mary Connor was unable to appreciate what she was doing when she had the conversation with Father Murphy—I shall deal with this topic later; and 3, it sheds a certain amount of light on the entire case, more especially on the question whether I am to consider the Strongs as purely benevolent people, or persons who are so zealous as to

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be partizan, and therefore not the most reliable witnesses to the truth.

After her public reception into the Church of Ireland, Mary Connor seems to have attended the religious ceremonies of that Church, and to have been looked upon as a member of the congregation. The child Josephine was sent to Leeson Park Day School, and also attended Sunday School. During this period Mary Connor does not seem to have been abandoned by her own people—she had occasional and friendly visits from her brothers and sisters—none from her mother, who, I assume, is an old woman. Mary Connor, who was always delicate, became seriously ill, and took to her bed fourteen days before her death, which took place on the 5th July, 1918. Mr. and Mrs. Strong tell us that Mary Connor expressed her desire that the Strongs should adopt Josephine Connor and bring her up as their own child, and also stated her desire that the child should be brought up as a Protestant. Mr. Strong, in his affidavit, does not tell us when this desire was expressed, but Mrs. Strong supplies the omission, for she says it was during Mary Connor's last illness, though at what period thereof she does not say. Towards the end of June the Rev. Mr. Baillie called in to see her, on which occasion, he says, she was a professing Protestant. On the 4th July she was, as Mrs. Strong tells us, visited by the Rev. Mr. Foley, who administered communion to her according to the Church of Ireland rite. So far, we have had to depend on the testimony of the Strongs, which, for the reasons I have already indicated, I view with grave suspicion. At this stage we have the benefit of other testimony. James Connor, a soldier, and a brother of Mary Connor, was home on leave from the front in June, 1918. He swears that he called to see his sister; that Mrs. Strong on that occasion told him a deliberate lie, namely, that Mary Connor was in England. It is admitted that Mary Connor was not in England; it is denied that Mrs. Strong made the lying statement. Mrs. Strong, however, does not deny that James Connor did call to see his sister; she does not aver that he did see his sister. The only possible conclusion is that the soldier called to see his sister, and did not see her. Am I to believe that there was no reason for that? According to all the probabilities I must

conclude that his statement that he was prevented from seeing his sick sister by a lie is correct. Again, we have the testimony of a Mrs. Gahan, an aunt of Mary Connor. Mrs. Gahan called in June to see her niece. Mrs. Strong again wanted to put off this visitor on the plea that Mary Connor was asleep. But Mrs. Gahan was determined to see her niece, and did succeed in seeing her. Apart from the matters I have already alluded to, is the testimony of people who seek to deprive a dying inmate of their house of the consolation of seeing those next to her in blood to be taken at its face value? I think not. What follows? Mrs. Gahan seeing how ill her niece had become, apparently stayed in the house 32 Charlotte Street for three days before Mary Connor died. On the 4th July, after her case had become hopeless, and when faced with death, Mary Connor turned to Mrs. Gahan and asked her to send for a priest. That is denied by Mrs. Strong, who states that the sending for a priest came from Mrs. Gahan and not from Mary Connor. On this point I prefer Mrs. Gahan's testimony to that of Mrs. Strong, which I reject. The priest, a Rev. Charles R. Murphy, came, and he gives us a detailed account of his interview. As that interview is all-important in the history of this case, I give it in the reverend gentleman's own language:—"On going into the room of the said Mary Connor I had a conversation with her. She told me that for some years previous she had attended Protestant services and ceremonies. She said, however, that she had never been a sincere Protestant, and that Mrs. Strong had on several occasions asked her to attend Protestant ceremonies, and to please Mrs. Strong she had done so. She also told me that her child, the said Josephine Connor, had been baptized a Catholic after its birth, and that subsequently at the request of the said Mrs. Strong the said Josephine Connor had been baptized into the Church of Ireland. The said Mary Connor showed intense anxiety to die a Catholic, and that her child, the said Josephine Connor, should be brought up a Catholic. I then received the said Mary Connor back into the Catholic Church, and administered the sacraments to her according to the rites of that Church. After the administration of the sacraments the said Mary Connor again impressed upon me that her last wish now was that her child, the said

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Josephine Connor, should be brought up a Roman Catholic, and she asked me to undertake to procure this. I promised her accordingly. Before I left the room of the said Mary Connor, her aunt, Mrs. Gahan, came into same, and the said Mary Connor repeated in her presence that she wished her child, the said Josephine Connor, to be brought up a Catholic."

Now, we have a curious thing in this litigation. When the case was before the Master of the Rolls there was not the slightest whisper of a suggestion that when Mary Connor saw the priest she was not in a mental condition to know what she did and said. Even allowing that the affidavits on both sides before the Master of the Rolls were very meagre, it is, in my opinion, inconceivable that this point, which, if it is a good point, is fatal to the appellants' case, should have been overlooked. Mrs. Strong, in her affidavit filed after the proceedings before the Master of the Rolls, says: "The said Mary Connor was actually dying and from bodily weakness and lethargy in no condition to resist further, and I believe that the said Mary Connor was then so prostrate with illness and approaching death, that she took little or no interest in anything, and was virtually incapable of giving any directions regarding herself or her child, or of inviting or resisting the attendance of any person at her bedside." On this point she calls in aid a Dr. Jackson, who says: "The physical and mental condition of said woman on the occasion of my visit was such that I do not consider she was in a fit state or had the capacity, owing to bodily weakness and approaching dissolution, to enter into religious controversy or to offer successful resistance to spiritual or other influences if brought to bear on her which might have been of an antagonistic or controversial character, and I believe said Mary Connor would not then nor could she subsequently have had sufficient strength of mind to withdraw or directly change any disposition already made by her as to her child's future."

Now, let us bear in mind some of the salient facts in this case. The woman was suffering from a disease from which she was apparently wasting to death. But it is not suggested the disease in itself affected her brain, or caused delusions or anything of that kind. The Strongs themselves rely on the Rev. Mr. Foley's ministrations on the 4th of July, and ask the Court to draw an

inference from them. Father Murphy's ministrations, on the other hand, are to be disregarded. To put it in another way, we are asked to conclude that the mother had intelligence enough to be and remain a Protestant; she had not intelligence enough to be or to become a Roman Catholic. The affidavit of Dr. Jackson is carefully drawn—"I do not consider she was in a fit state or had the capacity, owing to bodily weakness and approaching dissolution, to enter into religious controversy." Possibly not; a controversy between a Newman and a Kingsley would have left her cold. But what does that prove? The same remark might be truly made, I suppose, concerning most of us. The woman had been most of her life a Roman Catholic—a member of a Church of which a robust Protestant writer (Samuel Johnson) has said:—"A convert from Popery to Protestantism gives up so much of what he has held as sacred as anything that he retains; there is so much laceration of mind in such a conversion that it can hardly be sincere and lasting."—(Boswell's Life of Johnson, Oxford ed., vol. i, p. 403.) She had abandoned her faith, in my opinion, under the pinch of poverty and from the hope of material benefit; when poverty had no more fears for her, and material benefit no more attraction, am I to be told that it required the operation of an elaborate religious controversy to induce her, as a matter of conscience, to come back to the faith in which she was reared? I can well conceive Dr. Jackson's argumentative affidavit or the analogy of a deed or will referred to by the Lord Chancellor having great weight if this were a case of an alleged conversion to an altogether strange religion. The abandonment of old and the substitution of new beliefs is, normally at any rate, a process which involves much and slow chewing of the cud; a nice balancing of testimony; an earnest effort to do right, irrespective of cost. And a sudden deathbed conversion to a strange religion requires the exercise of power possible only to a strong, well-trained, well-developed intellect, and requiring effort from which even such an intellect might well shrink. But there is nothing of the kind in question here.

The woman had been a sincere Roman Catholic until she came to know the Strongs. If I believe her statement to Father Murphy—and I do believe it—she never ceased to be, at heart, a

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Roman Catholic; on the contrary, her conformity with the religion of the Strongs was a mere pretence, and, accordingly, repugnant to her conscience. In her case there was no violent intellectual wrench; no controversy was necessary to restore her ancient beliefs, for they were always present, though hidden by her for ulterior motives. If Dr. Jackson had sworn that this woman, in her then state, could not have understood what being a Roman Chtholic was, as distinguished from a Protestant, his affidavit would have been specific, and in point. Of course Dr. Jackson swears nothing of the kind, for he could not swear it. His affidavit is vague, unsatisfactory, speculative, and sworn in relation to a supposed state of facts—the necessity for the comprehension of religious controversy—which had no existence whatever.

On the other hand, we have the positive testimony as to what the woman said in the evidence of the Rev. Charles R. Murphy. That evidence is clear and convincing to a degree. Unless he invented it all, it is clear that Mary Connor, in this solemn moment of her life, knew perfectly well what she was doing. On what grounds are we to disbelieve and cast aside this positive and clear testimony? I see none. And indeed Mrs. Strong herself at one time seemed to have practically admitted the capacity of Mrs. Connor to do what the priest says she did. Father Murphy, in paragraph 5 of his affidavit—which paragraph, be it noted, is not contradicted—says:—"On the 5th July, 1918, I again visited No. 32 Charlotte Street, but the said Mary Connor was then dead. On that occasion I informed Mrs. Strong of the wish of the deceased that her child should be reared a Catholic, and I stated that arrangements would be made for the care of the child. Mrs. Strong stated in reply that she had no objection whatsoever to the child being so reared, and that she would not interfere at all in that matter."

There is no better way of testing truth than by seeing what was said at the time. Judged by that test, this belated suggestion of the Strongs that Mary Connor was not at the time she saw Father Murphy in a position to know what religion she wanted to die in, or her child live in and die in—vanishes into thin air. If it be observed that the sudden change of mind on

Mary Connor's part is itself an indication at least of a weak and wavering intellect, then all I say is that on the visit of the Protestant clergyman her case was not given up as hopeless. On the occasion of the Roman Catholic clergyman's visit it was. The presence of this element lends, for the reasons I have already stated, strength to the one statement which its absence denies to the other.

The conclusion of fact that I draw is that Mary Connor was a perfectly free agent in the transaction; that she wished to go back to the Roman Catholic religion, and, of course, it followed that she wished her child to be brought up in that religion; and, inasmuch as that was inconsistent with her intention to leave the child with the Strongs for adoption, it completely cancelled and put an end to the same.

The woman died on the 5th July, 1918, and was buried, I assume by her relatives, according to the rights of the Roman Catholic Church. The grandmother applied to Mrs. Strong for the child, and, having been refused, applied to the Master of the Rolls for an order for the delivery up of the child to her. On that occasion no scheme was presented or suggested to the Master of the Rolls for providing for the welfare of the child beyond that of sending it to the grandmother to Athy; though I make no doubt that the grandmother was then supported in her application by those who now come forward and avow themselves as her champions in fighting for the religion of the child. I may say I have equally no doubt that the Strongs are supported in this litigation by persons or societies who are actuated by a zeal of a similar sort, but moving in an opposite direction.

The Master of the Rolls refused the grandmother's application, mainly upon the ground that more material advantages were offered to the child by the Strongs than by the grandmother. As he put it himself, "I am convinced that the proposed move from the comparatively genteel and comfortable surroundings of a stationer's shop in Dublin to the very humble home of a charwoman would not be for the advantage of the child, either physically or morally."

With great respect, I think, for reasons which I shall state later, the Master of the Rolls misapplied the doctrine of "the

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benefit of the child," but it is, perhaps, not necessary for me to say as much, for the case as presented to this Court differs in many respects, and in one outstanding respect, from the case as presented to the Master of the Rolls. A Miss Palles—a lady of well-known social position—has agreed to become the guardian of the child, and, through Mr. Lynch K.C., who said he had her express authority for the statement, says she is willing to enter into any understanding required by the Court that she will see to it that the child is maintained and educated and fitted for the world in a suitable manner. A letter has also been read from the Sacred Heart Home, Drumcondra, expressing the willingness of that institution to receive the child. If any doubt existed as to the suitability of that institution, an inquiry could have been ordered. It was argued that life in the humble home in Athy, or life in the Sacred Heart Home, Drumcondra, would not be as advantageous for the child as life in No. 32 Charlotte Street, where the Strongs are willing to give the child a home and to adopt her, that is to say, if they are allowed to bring up the child a Protestant, and not otherwise. I am by no means prepared to assent to that view, but even if I were, I should still be of opinion, as will appear, that the child should not be allowed to remain with the Strongs.

Before I come to the law of this case, let me summarize what seem to me to be the salient facts of it.

1. The Strongs, who have the custody of this child, are no relatives whatever of the child.

2. Their only claim to the custody of the child rests on a wish of the mother expressed in her last illness.

3. As this wish was subsequently revoked by the mother, they have no claim whatever to it.

4. Their desire to have the child is on the terms of their being allowed to bring up the child in the Protestant religion.

5. The Protestant religion is not the religion in which the mother lived most of her life, or in which she died.

6. The mother, from conscientious motives, in the most solemn moment of her life, expressed her wishes that the child should be brought up a Roman Catholic.

7. The only blood relations of the child wish to carry out the mother's dying wishes.

8. Nothing is now known of the father.

9. The dying wishes of the mother and the wishes of the child's relatives can be given effect to while at the same time providing in a reasonable manner for the support, the clothing, the education, and the equipment of this child for the battle of life.

If I am right in my findings of fact, the next questions in the case are questions of law—1, As between a stranger and the blood relations of an illegitimate child whose parents are dead or not forthcoming, to whose custody will the Court entrust the child? 2, Will the Court pay any attention, and if so, what attention to the wishes of the mother of an illegitimate child as to the upbringing and religion of that child, where the mother has died, and the father is not forthcoming?

At the outset, let me say that it is necessary clearly to bear in mind the peculiar jurisdiction which the Court exercises in cases of this kind. In theory of law, the sovereign, as parens patriae, has jurisdiction over all infants, and this is as true of infants who are legitimate as of those born out of wedlock. The power is part of the Crown's prerogative (1 Coke upon Littleton, 160; see also *De Manneville* v. *De Manneville* (1). In a modern authority, the jurisdiction was thus referred to:—"A paternal jurisdiction, a judicially administered jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent" (Lord Esher M.R., in *R.* v. *Gyngall* (2). The jurisdiction, it will be seen, is as wide as it possibly can be; it extends to all children of tender years, whether legitimate or not; it does not depend on the possession by the child of property, for it will be exercised, and freely exercised, where the child has neither property nor the hope of obtaining property; under it the Court may regulate the custody in which and the terms under which the child is to be brought up, including the question of religion; the jurisdiction, supreme in theory, is limited in its exercise by considerations of public policy, equity, and good sense. The jurisdiction is applicable in

(1) 10 Vesey, 52.

(2) [1893] 2 Ch. D. 239.

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an especial way in the case of illegitimate children. A guardian of an illegitimate child could be appointed only by the Court of Chancery exercising this jurisdiction: *Priestley* v. *Hughes* (1); see also *R.* v. *Hopkins* (2).

Now it is, at any rate, a clear and intelligible proposition that the Courts pay no regard whatever to the blood relationship or to the wishes of the dead mother of an illegitimate child where the father is not to be found. During the argument that proposition seemed to find some favour with my colleagues, and the Lord Chancellor, in that connexion, referred us to *In re Kerr* (3). I shall deal later with *In re Kerr* (3); but I may say at once that I respectfully disagree with the proposition, and am of opinion that it has neither principle nor authority to support it. First, just look at the curious results of it. A mother dies leaving her illegitimate child, the father of which is unknown or not to be found. Who is to have custody of it? The Court of Chancery, which, mark, is put in the place of a parent over the child, refuses to say. Therefore, the first captor of the child keeps it. And possibly, if a second and stronger captor came along and took it from the first, again the Court would refuse to interfere. Or, perhaps, the richest person willing to adopt it will have it. When a proposition embodies such a barbarous principle as that, a lawyer may well suspect that the proposition is not in conformity with our law. Some other principle, more conformable to our notions of good sense and equity and natural justice, and consistent with public policy, must be found.

In my opinion the true principle is this: the Court of Chancery will, in the case of an illegitimate child, have regard to the blood relationship. It will, where both the parents are alive, give the custody of the child to the mother during her lifetime, and after her death to the father. Further, where the mother is dead, and there is no father before the Court, the Court should, and will, pay regard to the wishes, expressed or implied, of the mother; it will exercise its jurisdiction in this last-mentioned case upon an analogy to the case of the dead father of a legitimate child, paying real regard and respect to the wishes of the mother.

(1) 11 East, 13. (2) 7 East, 579.
(3) 22 L. R. Ir. 642; 24 L. R. Ir. 59.

Part of what I have said—that is, the part as to the custody during either of the parent's lifetime—is settled law; part is merely the expression of my own opinion on a matter which is practically barren of authority. It lies on me, therefore, to state, as shortly as I can, the reasons that have led me to my conclusion. These reasons are conversant with, and rest upon, the principle which regulates the right of the father in the case of a legitimate child. It is, therefore, necessary to glance at what that right is, on what it is founded, and I think it is also useful to say a word or two as to how it is applied; for, unless I am greatly mistaken, a great deal of misapprehension exists as to the extent and meaning of the doctrine that the Court will look to the child's benefit.

The father of a legitimate child has the right to its custody and control during his lifetime, even against the mother. On his death, so far as religion is concerned, his wishes prevail over those of the living mother; and this is so whether his wishes are ascertained from express statement, or implied from his own conduct in his lifetime, including the profession by him of a particular form of worship, or allowing the child to be brought up in any particular form of worship. The father's is not an absolute right, for it is subject to the overriding power of the Court of Chancery, exercisable according to well-settled rules for the benefit of the child.

On what does the father's right depend? It does not depend on contract—there is none; it does not depend on property, for a parent has no property in his child, and the right of the father is irrespective of whether the child has property or not. It depends, in my opinion, on the relationship, and on nothing else. The law, acting from motives of public policy, attaches to the relationship certain duties and certain rights—duties, such as the duty to support; rights, such as the right of custody and the right of chastisement. "Parents have power over their children by the law of nature and the Divine law; and by these laws they must educate, maintain, and defend their children: Wood's Inst. 63. And there being a reciprocal interest in each other, parents and children may maintain the suits of each other, and justify the defence of each other's person: 2 inst. 564; 1 Hawk P. C. 131;

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Cr. Jac. 296; 1 Hawk P.C. 83": 1 Coke upon Littleton, p. 138, n. a.

Campbell C.J., in *R.* v. *Clarke* (1), speaks of "parental authority, which both reason and revelation teach us to respect as essential for the welfare of the human race." James L.J., in *Agar Ellis* (2), says that "the right of the father to the custody and control of his children is one of the most sacred of rights." In *Agar Ellis* (3) Brett M.R. says: "The law of England has recognized the natural rights of a father, not as guardian of his children, but as the father, because he is the father. The rights of a father as guardian, if they could be limited to his rights as guardian, would probably be the same as a testamentary guardian; but the father has greater rights than those which a testamentary or other guardian can have. A testamentary guardian is not called on to feel affection for his ward; he is not called upon to forgive the ward; he is not called upon to treat the ward with tenderness. The law recognizes the rights of the father because it recognizes the natural duties of the father."

Later (p. 329) the same Judge cites with approval Vice-Chancellor Bowen in *Re Plomley* (4): "'One of these principles (and it is a paramount one) is that this Court, whatever be its authority or jurisdiction, has no right to interfere with the sacred right of a father over his own children.' It seems to me that in that word 'sacred' the Vice-Chancellor has summed up all that I have endeavoured to express.'"

There have been many cases on the books showing the manner in which, and the extent to which, the Court will assist the father in asserting his rights. The broad principle is that the father's will is, prima facie, the predominant factor, but that the Court will disregard it where the benefit of the child clearly requires it. For example, the Court may refuse to help the father to regain the custody of his child, or may even take the child from him, where the father's conduct and character, and past and present dealings with the child, are of such a kind that the Court cannot safely entrust the child to him.

I feel constrained by the judgment of the Master of the Rolls, and by some observations that fell from my colleagues, to say a

(1) 7 E. & B., at p. 195.
(2) 10 C. D. 172.
(3) 24 Ch. D., at pp. 327, 328.
(4) 47 L. T. N. S. 284.

word as to the doctrine that the Court will have regard to the benefit of the child. In no circumstances whatever does that mean that the child is to be put up to the highest and best bidder. That would be contrary to the sacred rights of the father, as well as putting on the Court the impossible task of ascertaining, to a nicety that would depress the scales one way or another, the quantum of material benefit or probable happiness in this custody or in that. This matter seems to me well settled. In *In re Nevin* (1), Bowen L.J. said:—"What the Court has to look to is the benefit of the child, and in so doing it will pay great respect to the expressed wishes of the father; and further, it will not treat the matter as one of barter, and direct the child to be brought up in the religion of one set of relatives merely because they offer a better provision for the infant than those on the other side." In *Agar Ellis's Case* (2), the same learned Judge said:—"It must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense, it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant having regard to the natural law, which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." In the same case, at p. 334, Cotton L.J. says:—"It has been said that we ought to consider the interest of the ward. Undoubtedly. But this Court holds this principle that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child."

The question of the wishes of the father has frequently been considered in cases in which disputes as to the religion of the child were determined. The suggestion is sometimes made that the question of what religion the child is to be brought up in is one of minor importance in the eyes of the law. Upon both

(1) [1891] 2 Ch. 313.
(2) 24 C. D. 317, at p. 337.

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reason and authority this is the reverse of the truth. The law weighs and considers in the most solemn way the question of the religion of the infant, and treats that question as one of paramount importance. And rightly so. If the Court were to deny to the father the choice of the child's religion, it would strike at the very root of the father's rights over his child. In one sense it is quite true to say that all religions are equal in the eyes of the law; in another sense it is most misleading and untrue. For the law will prefer, and must prefer, the religion of the father to any other religion, no matter how repugnant that religion may be to the Court, or to the majority of people in the district, or to the majority of people in the United Kingdom. Whether this observation would now be limited, as it certainly would have been limited half a century ago, to Christians and Jews, it is not necessary for me to say. It is sufficient, and all-sufficient, that the religion is the religion of the father. The books contain many statements of the principle and illustrations of it. Lord O'Hagan, in *In re Meads* (1)—a case dealing with the religion of a child—said: "The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law." Wood V.-C., in *Davis* v. *Davis* (2), said:—"The Court knew no rule but that of the highest morality and the preservation of all those sacred relations which existed between father and son. No form of the Christian faith was inconsistent with that rule of morality, or the observance of the right which Providence has conferred upon the parent of superintending, directing, and taking upon himself the sole responsibility of the religious education of his child"; and in a further passage he speaks of "this high and sacred right of the father."

The practice of the Court, in dealing with this subject, is thus stated by Lindley L.J., in *In re M'Grath* (3):—"The wishes of the father, if not clearly expressed by him, must be inferred from his conduct. If the father is dead, it will be naturally inferred that, in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion; that is, the

(1) I. R. 5 Eq. 103. (2) 10 W. R. 246.

(3) [1893] 1 Ch., at p. 148.

religion which he professed. This inference is one which the Court, in the absence of evidence to the contrary, is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion, unless it can be shown to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed." In considering the passage from Lindley L.J.'s judgment, where he says, "unless it can be shown to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed," care must be taken not to fall into the confusion of thought as to the benefit of the child already pointed out. The question as to whether the material benefit of the child will induce the Court to direct a child to be brought up in a religion other than that in which it would otherwise direct the child to be brought up is settled on very high authority. In *Talbot* v. *The Earl of Shrewsbury* (1), Lord Cottenham said:—"The first question is whether any pecuniary benefit will induce the Court to interfere with that course of education which the father has pointed out. If the Court were to exercise that discretion, it would be very difficult to say what was to be the extent of pecuniary benefit which should require the Court's interference —what was to be the price of the child's faith. It would be fraught with extreme danger; for if it is applicable to one description of Christians, it is applicable to another. . . . I wish to guard, however, against its being supposed that the religious faith in which this child is to be brought up is to be a matter of barter in this Court." This passage was expressly approved in this country by Smith M.R., in *In re Kellers, Minors* (2).

In my opinion the Court will never direct a child to be brought up in a religion other than that of the father unless either—1, the child had imbibed other religious convictions which it was deemed dangerous to disturb; or 2, the father had by his own action shown that he had no wishes in the matter, or that his wishes were that the child should be brought up in another religion. I test the view I have formed by taking this case: a father who has no property whatever dies and leaves young children; the mother is a millionaire; the mother offers to make most lavish provision for

(1) 4 My. & Cr. 673, at p. 688. (2) 5 Ir. Ch. R., at p. 339.

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the children on the condition that she is allowed to bring them up in a religion which is not the religion of the father; otherwise she will make no such provision. What should the Court do? My opinion is clear that the Court—assuming some reasonable alternative, for the Court cannot make provision itself—will not accede to the wishes of the mother, for even in the cold eyes of the law there are things more precious than gold and silver, and one of them is the parental right referred to in the passages I have cited, and which right, so far as the religion of a child is concerned, is a necessary corollary of liberty of conscience itself.

I have deemed it necessary to go into the question of the rights of the father of a legitimate child, because I think it has an important bearing upon this case. I have directed attention to the nature of the father's right, and above all, to the origin and foundation of it, because I think that when the Court, exercising an equitable jurisdiction, comes to consider the question of the rights of the mother of an illegitimate child, there is sufficient in the common foundation of her rights (some of which are undoubted) and of the legitimate father's rights, to coerce the Court into holding that, by analogy, the wishes of a dead mother on questions relating to the future of her child (including the important question of religion) must be considered and respected.

I now come to the question of the rights of the mother of an illegitimate child. I have shown, I think, that the rights of the father of a legitimate child rest on the relationship, to which the law, actuated by motives of public policy, attaches certain duties and rights. Why should the passages I have cited (from Coke on Littleton), "Parents have power over their children by the law of nature and the Divine law"; from Lord Campbell's judgment (in *R.* v. *Clarke* (1)), "Parental authority which both reason and revelation teach us to respect as essential for the welfare of the human race," not apply in the case of an illegitimate child? It will not do, as I think, to say that the law does not recognize the relationship, for that is only partially true. The law does recognize the relationship where relationship is of the essence of

(1) 7 E. & B. 195.

the thing to be considered. For example, it considers the relationship for the purpose of discussing marriage within prohibited degrees: "the rule that a bastard is nullius filius applies only to the case of inheritance (1), and the ties of nature hold as to maintenance and many other purposes" (*R.* v. *Hodnett*) (2). I agree with Vaughan Williams L.J. in the opinion expressed by him in *Humphreys* v. *Polak* (3) that there was at common law a duty to support on the part of the mother towards such a child, and that the series of legislative enactments on the subject did not create that duty, but merely recognized and defined it. The right of chastisement would be the same in both cases. A Court of Common Law applying strict doctrine on an application for habeas corpus might find some difficulty in recognizing the mother's right. The head-note to *R.* v. *Hopkins* (4) is as follows:—"The Court will grant a habeas corpus to bring up the body of the bastard child within the age of nurture for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud and afterwards by force; and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor, representing the King in Chancery." But the distinction between a Court of common law and a Court of equity has, so far as a living mother at any rate is concerned, ceased to have any practical importance, and her right to the custody of the child is now unquestioned—"there is in such cases a sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child" (Jessel M.R. in *R.* v. *Nash* (5)). "The mother of an illegitimate child has by law imposed upon her obligations in respect of the child, and by reason of such obligations is vested by law with corresponding rights, one of which is the right, prima facie, to the custody and possession of the person of the child. That right is given to the mother, not for the benefit or gratification of the mother, still less as part of her property, but in order to enable her to discharge the duties which the law imposes on her in respect of the infant and for its benefit": *Humphreys* v. *Polak* (6).

(1) 1 T. R. 101.
(2) 1 T. R. 96.
(3) [1901] 2 K. B. 389.
(4) 7 East, 579.
(5) 10 Q. B. D. 456.
(6) [1901] 2 K. B, at p. 390, per Stirling L.J.

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The leading case on the subject is *Barnardo* v. *M'Hugh* (1). In that case the mother of an illegitimate child of between eleven and twelve years of age entrusted it to Dr. Barnardo on the terms of a written agreement, one of the clauses of which provided that Dr. Barnardo was to have the custody and control of the child for twelve years. The mother was, at the time of the litigation, a Roman Catholic, and, in the words of Lord Coleridge, "appears for many years to have belonged to the Roman Catholic Church as far as she can be said to have belonged to any religious communion." Lord Esher said: "Her own religious belief is about as indifferent as it well can be. At one time she is a Protestant, at another a Roman Catholic. Finally, after several changes, she wishes to become a Roman Catholic, and her relations persuade her to insist that the child should be removed from a Protestant institution." After the child had been about a year and a half in Dr. Barnardo's Home, the mother, acting on the persuasion of some persons of the Roman Catholic faith to the effect that it would be better to remove the boy from Dr. Barnardo's care, and have him brought up in a Roman Catholic school, applied to have the boy removed, and, on Dr. Barnardo's refusal, applied for a writ of habeas corpus. A serious attack was made on the mother's character, and that question is thus discussed by Lord Coleridge C.J. in giving the judgment of the King's Bench Division:—"We are of opinion that the attack on the character of Mrs. M'Hugh has broken down. Her life—it cannot be questioned—was for many years open to reproach. Her habits are rough, her means of living are slender and precarious, and, if judged by an austere standard, she is certainly not the person one would select to take care of and to educate a boy of eleven or twelve years old. We have not, however, to select, and her moral shortcomings are, in our opinion, very far short of the point which would justify a Court in depriving her of the custody and control of her child, if she had it, and the sole question before us is whether or no she was to be continued in the enjoyment of it." The King's Bench Division granted the habeas corpus, Mrs. M'Hugh's counsel informing the Court that she was

(1) [1891] A. C. 388.

in a position to name as guardian for the boy a person of undoubted means and respectability, who would undertake to the Court that the boy should be as well taught and cared for as he had theretofore been. The decision was unanimously affirmed in the Court of Appeal and in the House of Lords. In the King's Bench Division Lord Coleridge, in giving the judgment of the Court (p. 199), expresses the view that it made no difference that the child was illegitimate, thus stamping the rights of the mother of an illegitimate child as of the same nature and quality as the rights of the father of a legitimate child. In the Court of Appeal Lord Esher said:—"As to the law, the child is illegitimate. That fact makes a difference with respect to the position of the mother before the Court; but I am of opinion that it makes no difference whatever with respect to her right to the custody of the child. In this respect there is no difference whatever between the rights of the mother of an illegitimate child and the rights of the father, or mother if there is no father living, of a legitimate child. What are the rights of the mother of a legitimate child? It is her undoubted right, if there is no father living, to have the company and care of, and the control over, her own child. That is the law of England, founded on the law of nature." Lord Lindley said:—"The child is illegitimate. The consequence is that he has no guardian: *Re Ullee* (1). In other words, there is no person who has all the rights of a guardian over either him or his property. But, although this is true, it is now settled, after some fluctuation of opinion, that the mother of an illegitimate child has a prima facie right to the custody of the child up to the age of fourteen in preference either to the reputed father or to any other person: *Reg.* v. *Nash* (2). This right is based on the relationship which exists between a mother and her child, and on the absence of all superior right on the part of the reputed father or of anyone else. This right of the mother is, no doubt, subject to control by the High Court, and if in any case it be proved that a mother is unfit to have the custody of her own illegitimate child, the Court clearly has jurisdiction to remove the child from her control. The power of the Court of Chancery to deprive a father of the custody of his own legitimate child in

(1) 53 L. T. (N. S.) 711. (2) 10 Q. B. D. 454.

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a proper case is undoubted; and the power of the High Court over the mother of an illegitimate child is certainly not less extensive. The power of the Court to control the mother is, in truth indisputable and not disputed. But the Court will not interfere with her arbitrarily, and will support her and give effect to her views and wishes unless it becomes the duty of the Court towards the child to refuse to do so. Taking this view of the mother's rights and of the duty of the Court, I see no reason why a mother should not, from time to time, change her mind as to where, how, or by whom her child shall be brought up, nor why the Court should interfere with her, or refuse to support her, unless circumstances be proved which satisfy the Court that its duty to the infant requires it to act contrary to her wishes." When the case came to the House of Lords, Lord Halsbury said:—"It is clear that the written agreement with Dr. Barnardo cannot determine the question. It is equally clear that but for the circumstance of the child being illegitimate, there would be no doubt as to what order should be made. The question is, whether that circumstance is conclusive against the mother on her present application. My Lords, I doubt very much whether any absolute rule can be laid down; but in *Reg.* v. *Nash* (1) this very question came for decision before the Court of Appeal, and Sir George Jessel appears to me to have pointed out the distinction between strict legal rights as to guardianship and the jurisdiction which a Court of Equity does and always did exercise in regard to such orders as are now in question. Sir George Jessel pointed out that that Court is now governed by equitable rules, and that in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. 'There is in such a case (he says) a sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child.' His Lordship, I think, did not mean an absolute right; but such a right as he had already described to be considered by a Court of Equity in making such orders. . . . It is clear, further, that the law has placed upon the mother of an illegitimate child obligations which ought to, and, in my

(1) 10 Q. B. D. 454.

opinion, do, bring with them corresponding rights. Whether the right is, as Lindley L.J. expresses it, a prima facie right to the custody of the child, or whether it be the settled view of the Court of Equity that the mother's wishes ought to be consulted, if she has not forfeited the right to be consulted by any misconduct of her own, seems to me to be immaterial to decide." Lord Herschell said:—"It was contended on behalf of the appellant that she has no such right; whilst, on the other hand, it was argued that her rights are the same as those which a father possesses with regard to his legitimate children. In the Courts below, the latter proposition appears to have been considered to be established by the authorities. I do not feel satisfied that the authorities do establish that proposition." Later on Lord Herschell said, referring to *R.* v. *Nash* (1): "I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered." Lord Field concurred.

*Barnardo* v. *M'Hugh* (2) establishes the proposition that the Court will not merely have regard to the wishes of the living mother of an illegitimate child, but will follow these wishes in absence of overwhelming reasons to the contrary. For it must be observed that there were, in that case, reasons advanced against this right, to wit—1, the mother was not exactly a model character; 2, she was acting under persuasion (in the opinion of some of the Judges at any rate) rather than from conviction in her effort to get the child placed in a Roman Catholic school, and her own religious convictions were of a doubtful character; 3, she had placed the child with Dr. Barnardo under an agreement to leave him there for twelve years, and she had actually left him there for eighteen months. These were substantial reasons, some would, perhaps, say grave reasons; but they were given the go-by in comparison with the wishes of the mother. It may be that the living mother of an illegitimate child has no strict "right" to the custody and control of her child; it may be that in olden times a Court of Common Law might refuse to look at her relationship at all; but certain it is—as I read *Barnardo* v. *M'Hugh* (2)—that a Court of Chancery will consider the wishes of the mother of an

(1) 10 Q. B. D. 454.
(2) [1891] A. C. 388.

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illegitimate child, and will, on such consideration, weigh the pros and cons of the case in the same scales and with the same weights as are used where the wishes of the father of a legitimate child are in question.

Before I pass from the settled law as to the rights of the living mother of an illegitimate child, I must mention *Ex parte Knee* (1), in which it was held (and the case has never been questioned) that the mother of an illegitimate child is entitled to its custody in preference to the father, though from his circumstances he may be better able to educate it. What is the foundation of the analogy between the right or wish of a father of a legitimate and that of the living mother of an illegitimate child, as a result of which, in substance, the same weight will be given to the wishes of one as to those of the other? Is it not this: the father's right rests on relationship (I think I have shown this already by the opinions of eminent Judges cited); he is the parent; the mother of an illegitimate child is just as much the parent? Out of the natural relationship grow rights and duties enforceable by moral and legal sanction. If these rights and duties are to be performed, they require to be encouraged by a control to which the Courts of Justice lend their aid.

How where the parent is dead? The duties and obligations disappear with the death. They disappear just the same whether the death is of the father of a legitimate child or the mother of an illegitimate child. In the case of a legitimate orphan child, having no testamentary guardian, the Court will, in the absence of good reason to the contrary, prefer the natural custody of blood relations to that of strangers, though better endowed with this world's goods, and whose sole claim (if it can be called a claim) rests on a wish to have the child. If the child is illegitimate, surely, by analogy, the Court should prefer the blood relations, who have a natural claim, to a perfect stranger, who has no claim at all. The wishes of the father of a legitimate child as to its custody and religion are respected when he is in his grave. Why should not the wishes of the dead mother be likewise respected? The wishes of the dead father are respected, as I think, for two reasons: 1, because, just as nature abhors a vacuum, our law will not

(1) 1 Bos. & P. N. R. 148.

permit what is one of the highest functions of our Courts—the control of the custody of children—to be left devoid of some guiding principle, in which contingency every infant would be the sport of chance, or fraud, or force; and 2, to encourage the parental effort of maintenance and control in the parent's lifetime. It is necessary and right that the parent should know that his teaching and upbringing of the child should not be frustrated by a teaching and upbringing which in his lifetime he would disapprove of, or perhaps abhor.

Is not each of these reasons applicable, in all its fulness, to the mother of an illegitimate child? And if so, why should not a Court of Chancery, following the analogy to its legitimate conclusion, respect the wishes of the mother of an illegitimate child? I can see no reason to the contrary; I can see obvious reasons why the Court of Chancery should so act. The obvious reason is, of course, this (I have already referred to it): if the Courts will pay no attention to the wishes of the mother, then the first captor may have and hold the child. That would be an absurd state of the law. But if the law pays any respect to the wishes of the dead mother, it must be a real and not a feigned respect, for this would be still more absurd. And if real respect is to be shown, what ground of distinction can be made out for giving less weight to the wishes of the dead mother than to those of the dead father? I see none.

There is, in my opinion, no direct authority on the question how far the Court will have regard to the wishes of the dead mother of an illegitimate child. The Lord Chancellor referred in the course of the argument to *In re Kerr* (1). That case decided that the putative father is entitled, after the mother's death, to the custody of his illegitimate child. Even if we were not bound by that case, I should unhesitatingly agree to it. But what has it got to say to a case where there is no putative father to consider, and where the contest is between the wishes of the dead mother and those of a stranger? In my opinion, nothing whatever. In that case Gibson J. in the King's Bench Division said:—"In my opinion she has no right to deal with its future custody." That judgment was approved of by the Court of Appeal by

(1) 22 L. R. Ir. 642; 24 L. R. Ir. 59.

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FitzGibbon L.J.; Barry L.J., however, said:—"Though the mother of an illegitimate child has, perhaps, no right to appoint a guardian for it, still I guard myself against laying down any general rule that would prevent our sustaining such a guardianship under special circumstances." The strict right is denied; how far the Court will have regard to the mother's wishes against a stranger is, however, left open, and that is the point here. A case having a faint bearing on the question is *Ward* v. *St. Paul* (1). In this case the father of an illegitimate child had appointed guardians of the child by his will. The Court, while holding that the testator could not, strictly speaking, appoint testamentary guardians to a natural child, yet appointed the persons named in the will without referring it to the Master to approve of proper persons to be guardians (see also *Peckham* v. *Peckham* (2). In that case no question of the mother's wishes arose—she was, it may be assumed, either dead or willing to forward the wishes of the putative father (a man of rank), but it is a case that shows that to some extent at any rate the Court will be influenced by the wishes of the dead parent of an illegitimate. Save to the extent I have indicated, the question is res integra.

I express my views with diffidence, especially as my colleagues differ from me; but as I think that my decision is more consonant with principle and good sense than the opposite view, and as the question is one of importance, I have felt bound not only to state my opinion, but also to state my reasons, at, I fear, somewhat wearisome length.

I glance at three matters relied on for the respondents. They are, in view of the authorities, hardly arguable. The first is this: that the mother had by bringing up her child as a Protestant for six years forfeited her right to change her mind in regard to the religious education of her child. It is quite clear that a parent has a right to change his mind: *Re Nevin* (3) and *Barnardo* v. *M'Hugh* (4) conclusively settled this. The second suggestion is that the child has been so much imbued with the tenets of the Protestant religion that it is unsafe to disturb its religious views. This verges on the absurd, and is in the teeth of many authorities

(1) 2 Bro. C. C. 584.
(2) 2 Cox, 46.
(3) [1891] 2 Ch. 299.
(4) [1891] A. C. 388.

on the subject. The third suggestion is that the mother forfeited any right she had by her conduct. But there is obviously no abandonment of the child here; the child was in the sole custody and control of the mother until the mother's death. Had the mother lived and wished to take away the child, it is as clear as anything can be in law that the mother could have taken the child and disposed of its religious or other education, or of its welfare, as she thought fit. The mother's death creates the difficulty we are set to solve. I have tried to solve it to the best of my ability, and I am convinced that the legal solution arrived at by me is in accordance with the real merits of this peculiar case. Being therefore of opinion that the decision of the Master of the Rolls overrides the wish of the blood relations, and violates the wish of the dying mother, clearly, adequately, and emphatically expressed on a matter which the law holds vital, and as to which the mother's wishes in the circumstances of this case are the sole element for our consideration, I am of opinion that the appeal should be allowed.

Let me say a word in conclusion. It is a general observation, quite beside this case, but I think it is to the public interest to make it, and I think it is in accordance with the spirit of a remark let fall during the argument by the Lord Chancellor. There are a number of people in this country and elsewhere willing and anxious, by the expenditure of money or money's worth, to convert others to their own creed. Can any man of experience say that he has ever known any good whatever to come from such effort? On the contrary, the fact constantly presses on the minds of thinking and tolerant people that such effort causes much harm. In this country it accentuates religious differences; creates suspicion, bitterness, and resentment where none previously existed; it poisons the wells of charity; it sterilizes social work by dividing people who otherwise would work in harmony for the common weal. I write my protest against it, for I consider it an evil of no small concern to the community.

Solicitor for appellant: *Daniel Purcell.*
Solicitors for respondents: *Webb, Scott, & Seymour.*

R. ST. J. C.

*Powell J.*
1919.

## In re HOGAN and MARNELL'S CONTRACT.

May 20, 28. *Vendor and purchaser—Forcing doubtful title—Difficult question of construction—Procedure—Vendor and purchaser summons—Originating summons—Costs.*

Where a vendor's title to land depends upon a question of construction involving real difficulty, that question ought to be decided on an originating summons, and not on a vendor and purchaser summons.

A vendor of lands made title under the residuary clause in a codicil which ratified and confirmed a will. The purchaser objected to the title, alleging that the property passed under the residuary clause in the will.

*Held,* applying *In re Nichol's and Von Joel's Contract,* [1910] 1 Ch. 43, that the question ought to be decided upon an originating summons so as to bind everybody, that the present summons should stand adjourned so as to allow the vendor to take out such a summons, and that the purchaser should have the costs of the present summons.

Vendor and Purchaser Summons on behalf of Mary Hogan, the vendor, for an order that the requisitions of Thomas Marnell, the purchaser, had been sufficiently answered by the vendor, and that a good title to the lands had been shown.

The lands in question were sold by public auction on the 28th of October, 1918, and Thomas Marnell was declared the purchaser, and agreed to purchase the lands for the sum of £1700. The particulars and conditions of sale stated that the lands were held by the vendor in fee-simple, and contained 92 acres 1 rood and 30 perches, statute measure, subject to the payment of an annuity of £41 19*s.* 2*d.*, under the provisions of the Land Law (Ireland) Acts.

The following facts appeared from the affidavits:—John Delaney, at the date of his death, was entitled to the lands in question as tenant from year to year. By his will dated 21st November, 1890, after making certain specific bequests, he devised and bequeathed all the rest, residue, and remainder of his real and personal estate not thereinbefore disposed of to trustees on trust to sell or otherwise convert the same into money, and after payment thereout of the testator's funeral and testamentary

expenses and debts, and subject thereto, to pay £1000 free of legacy duty to his son, the Rev. William Delaney, and to set apart two sums of £1500 each, free from legacy duty, and invest the same in trustee securities, and pay the income of one of the said sums of £1500 to his daughter Annie during her life, and after her death to her husband, if she should die leaving such, for his life, and after the death of the survivor of them in trust for the children of his said daughter as she should by deed or will or codicil appoint, and, in default of such appointment, for all the children of his said daughter who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry; and if there should be no children of his said daughter who should attain the age of twenty-one years or marry, then upon such trusts as his said daughter should by deed or will appoint, and in default of appointment to his said daughter absolutely. The testator directed his trustees to hold the other of the said sums of £1500 upon the like trusts for his daughter Margaret. He also directed that in case the moneys produced by such sale should not be sufficient to produce the sums of £1000, £1500, and £1500, the same should abate rateably, and he directed that his trustees should hold any moneys that might remain after paying the debts and legacies aforesaid upon trust to divide the same into two equal shares and add one share to each of the said sums of £1500 so to be set apart respectively for each of his two daughters, such additional share to be subject to the trusts of the sum to which it should be added.

By a codicil to this will dated 14th June, 1893, he appointed Dr. Eugene Francis Hogan to be an executor and trustee of his will, and after reciting that he had already provided for his said two daughters by transferring into their respective names jointly with his own securities of the value of £2000 each, he revoked the said legacies of £1500 given to them by his will, and directed that they should have the sums of £2000 as their absolute property. The codicil concludes with the following words:—"I appoint my three daughters, Margaret, Annie, and Mary, wife of Dr. Eugene Francis Hogan, residuary legatees of my said will. I ratify and confirm the appointment of the Rev. Martin Howley, Parish

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Priest, and the Rev. William Delaney as trustees and executors of same in conjunction with Dr. Eugene Francis Hogan, and in every other respect I ratify and confirm my said will."

On the 26th August, 1893, the testator executed a second codicil, which is not material, and he died on the 8th of January, 1895. Probate of his will and codicils was on the 19th March, 1895, granted to two of the executors.

Annie Delaney died on the 2nd June, 1904, and by her will she bequeathed all her property to her two sisters Margaret and Mary. By indenture of assignment of the 1st February, 1907, Margaret Delaney assigned all her interest in the lands to Eugene Francis Hogan and his wife, Mary Hogan, the vendor. Eugene Francis Hogan died on the 30th September, 1917, leaving his widow, Mary Hogan, surviving. Mary Hogan put up the lands in question for sale, and Thomas Marnell was declared the purchaser.

Clause 6 of the conditions of sale provided that the title should commence with the will and two codicils of John Delaney, deceased, executed respectively on the 21st November, 1890, 14th June, 1893, and 26th August, 1893.

The following requisition was made by the purchaser:—"Under the will of John Delaney, deceased, the ultimate residue, after payment of (inter alia) two sums of £1500, is to be divided into two equal shares, which are to go to the testator's daughters, Annie and Margaret, for their respective lives, with remainders over as in the said will mentioned. By the first codicil to said will testator revoked the said legacies of £1500 each, and appointed his daughters, Margaret, Annie, and Mary, residuary legatees. Title is deduced on the assumption that the property for sale passes under the residuary bequest contained in the codicil, but purchaser submits that there is another construction possible, namely, that the residuary bequest contained in the codicil operates only on the two sums of £1500 each, and that the property in question passes under the residuary clause of the will. Under these circumstances the will must be construed by the Court before the purchaser can complete."

The answer to this requisition is as follows:—"The vendor is advised that it is clear that the revocation of the legacies of

£1500 necessarily revoked the accretions thereto, and therefore revoked the gift of the surplus which was directed to be added to the legacies; and the vendor accordingly declines to have the will construed by the Court."

The purchaser replied:—"Inasmuch as the title turns upon a question of construction of the will, the purchaser is advised that he cannot safely take the title without having the will construed."

The vendor refused to have the will construed, and took out the present summons.

*Swayne K.C.* and *fforde*, for the vendor.

*H. Wilson K.C.* (with him *O'Byrne*), for the purchaser:—

A codicil republishes the will as of the date of the codicil: *Grealy* v. *Sampson* (1). Therefore, the will and codicil in the present case are to be read as one will dated 1893. The property passes under the residuary clause in the will dealing with the surplus. That clause is read with the codicil, and both residuary clauses stand good, and the first is operative: *Hardwicke* v. *Douglas* (2). In *In re Murphy & Griffin's Contract* (3) the title was clearly good, and this Court decided the matter on a vendor and purchaser summons. Here the title is too doubtful to force on a purchaser.

*Swayne K.C.*, in reply:—

The vendor makes title under the residuary clause in the codicil. The codicil revoked the legacies of £1500 as well as the residuary gift of the surplus. If necessary, I ask the Court to treat the summons as an originating summons on notice to all parties interested.

*Cur. adv. vult.*

May 28.

POWELL J.:—

[Having stated the above facts, proceeded.] I confess that when I read the will and codicils it appeared to me at first that the residuary gift in the codicil operated as a revocation of the residuary gift in the will according to the decision in *Hardwicke* v. *Douglas* (2) of Lord Brougham and Lord Lyndhurst, Lord Cottenham dissenting.

(1) [1917] 1 I. R. 286. (2) 7 Cl. & F. 795. (3) [1919] 1 I. R. 187.

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Mr. Wilson does not contest the authority of this case, although I think he prefers the reasons in the dissenting judgment of Lord Cottenham to those of the majority of the Court; and certainly they seem to support to some extent the very ingenious point which he has raised, and which, as put by him, does not appear to be concluded by the decision of the majority of the Court in *Hardwicke* v. *Douglas* (1). He relies upon republication of the will by the codicil, which gives the words of the will the same force and operation as they would have had if the will had been executed at the time of the republication, subject, of course, to the limitation that the intention of the testator is not defeated thereby. He refers to a very long and learned judgment of Lord Justice Ronan in *Grealy* v. *Sampson* (2), in which the learned Lord Justice and Lord Justice Molony in the case before them held that a codicil operated as a republication of the will, and that accordingly, in the absence of a contrary intention, the language of the will must be construed as of the date of the codicil.

Lord Justice Ronan examined all the authorities on this subject with great care, and seems to disagree with the part of the judgment of the Lord Chancellor in *Mountcashell* v. *Smyth* (3) in which it was held that certain dates in the will must be incorporated with the provisions in the codicil. He refers to a great number of cases, amongst others, *In re Champion* (4), in which Mr. Justice North said: "It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects' is a republication of a will, and when under the old law a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date"; and this judgment was affirmed by the Court of Appeal. He refers to *In re Fraser* (5), in which Lord Justice Stirling, in delivering the judgment of the Court of Appeal (Vaughan-Williams,

(1) 7 Cl. & F. 795.
(2) [1917] 1 I. R. 286.
(3) [1895] 1 I. R. 346.
(4) [1893] 1 Ch. 101.
(5) [1904] 1 Ch. 726.

Stirling, and Cozens-Hardy L.JJ.), states the effect of republication, which he calls "confirmation," thus:—"The effect of this [confirmation] is to bring the will down to the date of the codicil, and effect the same dispositions of the testator's estate as if the testator had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced by the various codicils." He also refers to *In re Whiting* (1), in which Mr. Justice Joyce says:—"The effect of these last words, 'In all other respects I confirm my said will,' is now at all events well settled. The case of *In re Fraser* (2) decides that the effect of confirming a will as altered by a codicil is that the codicil is a republication of the will. There is no doubt about that." It is sufficient to refer to these cases, out of very many more, which were discussed by Lord Justice Ronan.

Mr. Wilson applies this principle to the present case. He points out that in the earlier part of the will there is a good residuary clause for conversion; then there are specific legacies payable out of this residue to Margaret and Annie Delaney of £1500, the income payable to each for life, with executory limitations, including power of appointment in the events mentioned, with provision that if the moneys produced by the sale, &c., together with the moneys possessed at the time of the death of the testator, were not sufficient, the legacies were to abate rateably. He refers to the provision that the trustees should stand possessed of any moneys, &c., that might remain after setting apart debts and sums thereinbefore mentioned upon trust to divide same into two equal shares, and to add one of such shares to the share of each of the two daughters, the additional shares to be subject to the same trusts, and he says that this is a disposition of a second residue, or a residue of a residue; then comes the codicil revoking the two specific legacies of £1500, revoking the limitations in respect of these legacies, and declaring that the legatees are to be entitled to £2000 each absolutely, instead of the £1500 each. So far there would prima facie remain unrevoked the gift of the ultimate residue or residue of the residue to be held for Margaret and Annie upon the original trust applicable to the bequest of the legacies of £1500 to these two daughters.

(1) [1913] 2 Ch. 1. (2) [1904] 1 Ch. 726.

*Powell J.* 1919.

*In re* Hogan and Marnell's Contract.

Then comes the bequest of the residue in the codicil to Margaret, Annie, and Mary, who is introduced for the first time. Mr. Wilson points out that as there is no revocation in terms of the disposition of the ultimate residue in the will, which will is brought down to the date of the codicil, and as that codicil in all other respects save those mentioned confirms the will, this disposition of the residue in the codicil must be read with the bequest of the ultimate residue in the will so brought down to that date, and that therefore, in the events that have happened, the estate is not vested in Mary, as alleged by the vendor, because there is a husband of Margaret, and there may be children of the marriage.

Mr. Swayne contends that this is not so, that it is clear on construing the will according to the intention of the testator that the bequest in the will of the ultimate residue is revoked by the bequest of the residue in the codicil.

It is better in the view which I take as to what I should do on this application that I should not discuss this argument in detail, but I may be permitted to say that I think Mr. Swayne has given very sound reasons for his contention, although I cannot say that the question of construction is so plain and obvious that the purchaser runs no risk of future litigation in respect of it. There is a class of case in which, where a whole current of authority has settled what the legal effect of a certain construction of a written document is to be, and when there can be only one reasonable construction of such a document, and when that construction clearly shows that the vendor has a good title, the Court will not hesitate so to decide on a vendor and purchaser summons; but in my opinion the present is not that class of case. Here the authorities are prima facie against the vendor. Mr. Swayne is too good a lawyer not to have appreciated this difficulty, and he suggested that I might turn this summons into one asking for a decision as to the construction of this will and codicil, the persons interested receiving notice of the application. This would be a very inconvenient course. I doubt if I would have power to do it, and it would not save the vendor any expense, because, whatever the result might be of that application, I would feel obliged at the end to give the purchaser the costs of the present application

On the other hand, if I were to decide now against the vendor without more, it might be taken to be a blot upon the title, which might be injurious to the vendor. I am, therefore, prepared to adopt the course taken by Lord Justice Neville and by the Court of Appeal in *In re Nichol's and Von Joel's Contract* (1), which is, I think, also an authority which compels me to hold that I ought not to accede to the vendor's application on this summary procedure.

[The learned Judge referred to the head-note and judgments in that case.]

I am prepared now to hold that the question involved here is a question which ought to be decided upon a construction summons so as to bind everybody, but I am prepared to allow the present application to stand over so as to allow the vendor to take out a construction summons. If the question is then decided in favour of the vendor, I can make an order on this summons that the vendor has shown a good title, and that will relieve the vendor from any consequences which might result from an order now made declaring that she had not shown a good title.

Of course I must give the purchaser the costs of the present application.

Solicitors for the vendor: *Bridge & Rolleston.*
Solicitor for the purchaser: *W. X. White.*

D. M. S.

(1) [1910] 1 Ch. 43.

*Appeal*, 1919.

April 4.

## BEAMISH *v.* THE ATTORNEY-GENERAL AND OTHERS (1).

*Practice—Originating Summons—Time for appealing—R.S.C.*, 1905, *Order 58, rule 15; Order 55, rule 4.*

An originating summons taken out pursuant to Order 55, rule 4, is an action; and the time for appealing from an order of the Court on such a summons is not limited to twenty-one days.

APPEAL from an order of O'Connor M.R., upon an originating summons taken out by the plaintiff, Edith H. Beamish, administratrix, with the will of Thomas Beamish annexed, against the Attorney-General, and Penrose Beale Beamish, and others, defendants, who claimed to be legatees, asking the Court to construe certain provisions contained in the will of the deceased. The order was made on the 19th July, 1918; notice of appeal was served on the 4th February, 1919, and a preliminary objection was taken on the ground that notice should have been given within three weeks.

*Hugh Kennedy* (with him *Lynch K.C.*), for the respondent:—

We submit that this is an originating summons under Order 54a for the determination of a question of construction arising under an instrument, and that it is not an originating summons for administration, foreclosure, etc., under Order 55. We admit that it is settled that an originating summons under Order 55 is an action, and so is not within Order 58, rule 9, as to time for appealing: *In re Fawsitt* (2); *In re Vardon's Trusts* (3). The present case is not within those decisions, and is, in no sense, in the nature of an action. It is within the principle of the decisions with reference to vendor and purchaser summonses: *In re Blyth and Young* (4); *In re Rickett's and Avent's Contract* (5); *In re Walker and Oakshott's Contract* (6); or of the like principle contained in

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.
(2) 30 Ch. Div. 231.
(3) 55 L. J. Ch. 259.
(4) 13 Ch. Div. 416.
(5) [1890] W. N. 16.
(6) [1902] W. N. 147.

decisions under the Trustee Relief Act: *In re Baillie's Trusts* (1). This is a matter not being an action under Order 58, rule 9, and, accordingly, the time for appealing is limited to twenty-one days.

*J. M. FitzGerald*, for the appellant:—

The appellant was Penrose Beale Beamish, a residuary legatee under the will of Thomas Beamish. An originating summons taken out by an administratrix with will annexed under Order 55, rule 4, for the determination of a question affecting the interest of legatees under this will without administration of the estate of the deceased, is an action within the meaning of sect. 3 of the Judicature (Ireland) Act, 1877, and Order 58, rule 15; and I submit that an appeal from an order made on such originating summons may be brought at any time within one year from the time at which the order was perfected.

The determination of questions such as now come within Order 55, rule 4, could only have been obtained prior to the Judicature Act by bringing a plenary suit or action. In the Judicature Act, sect. 3, "action" is defined as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court." Order 1, rule 1, gives a different definition of "action," but does not override the terms of sect. 3 of the Act. It has been decided in England that an originating summons, such as that in this case, is an action within the meaning of the corresponding English Rules: *In re Fawsitt* (2); *In re Vardon's Trusts* (3).

The practice in Ireland has always been to treat such an originating summons as an action for the purpose of Order 58, rule 15, in respect of time for appeal, but there is no decided case here on the point.

*Kennedy*, in reply.

SIR JAMES H. CAMPBELL C.:—

If this matter had come up for determination for the first time, we should possibly have to consider it; but it is the subject-matter of a decision given so far back as the year 1885 in the Court of Appeal in England, and from that time to this it has

(1) 4 Ch. Div. 785. (2) 30 Ch. Div. 231. (3) 55 L. J. Ch. 259.

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been the settled practice that where the rules made under the Judicature Act prescribe an originating summons as the method of procedure the proceedings so commenced shall be treated as an action for the purpose of appeal. The case of *In re Fawsitt* (1) was decided by a very strong Court, viz., Cotton, Lindley, and Fry L.JJ. Following that authority, we hold that the order in this case was final, and that the time for giving notice of appeal is not limited to twenty-one days.

RONAN L.J.:—

I agree. Order 58, rule 15, says:—"No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by leave of the Court, be brought after the expiration of twenty-one days." This was an order made in a matter which was an action, and, therefore, is not within the rule.

O'CONNOR L.J. concurred.

Solicitor for the appellant: *J. T. Wolfe.*
Solicitor for the respondent: *A. Julian.*

C. L.

(1) 30 Ch. Div. 231.

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**COMPANY**—*continued.*
resolution of the directors be forfeited for the benefit of the company." Notices with respect to shares to which persons were jointly entitled were to be given to the person named first on the register of members; and a notice was to be served either personally or by post, "addressed to such member at his registered or last known place of abode." In 1892 *K.* and *M.* were registered as joint owners of 115 shares in the company, *K.*'s address being noted as North Earl Street, Dublin, and *M.*'s as Usher's Quay, Dublin; but there was a special note, dated 1889, that *M.*'s then address was 13 Oxford Street, Sydney, N.S.W. *K.* died in 1899, and though the fact of his death was never officially notified to the company, it was, in fact, well known to its officials. Notices of meetings of the company at which dividends would be declared continued to be sent out to *K.*, whose name appeared first on the register of members, and were returned by the Post Office marked "gone away," and in one instance "deceased." *M.* died in 1908, and on a claim for past dividends being made by his executrix, the company relied on resolutions forfeiting the unclaimed dividends for the years 1908, 1909, 1910, 1911, 1912, and 1913. *Held*, that a resolution forfeiting an unclaimed dividend must be strictissimi juris; that the provisions of the Articles of Association regarding the service of notices on the shareholders must not be used dishonestly or unfairly; and that if the officers of a company have actual knowledge that one of two joint shareholders is dead, the company cannot rely upon a formal notice addressed to the deceased shareholder for the purpose of basing upon it a resolution forfeiting an unclaimed dividend. *New Zealand Gold Extraction Co.* v. *Peacock* ([1894] 1 Q. B. 622), *Allen* v. *Gold Reefs of West Africa, Ltd.* ([1900] 1 Ch. 656), distinguished: *James* v. *Bueno Venturo Nitrate Grounds Syndicate* ([1896] 1 Ch. 456) applied. *Ward* v. *Dublin North City Milling Co., Ltd.* - - M. R. 5

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**COPYRIGHT**—*continued.*
35.] The defendant *G.* wrote a book for school use, the copyright in which he assigned to the plaintiffs, and agreed not to publish any similar work during the subsistence of the agreement. He subsequently wrote for the defendants F. Bros. a book on the same lines, adopting the same system, repeating the same kind of lessons, intended practically for the same class of pupils, and F. Bros. published it at a like low price. *Held*, that the author in the subsequent work had made an unfair use of the materials used in the preparation of the former work, and that consequently the publication of the second book was an infringement of the plaintiffs' copyright in the first; that the agreement was not in unreasonable restraint of trade; and that the defendants F. Bros. should be restrained by injunction from publishing the second book. *Burfield* v. *Nicholson* (2 Sim. & S. 1) followed. *Educational Company of Ireland, Ltd.*, v. *Fallon Bros. & Getz* - Ross J. 62

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**FOOD SUPPLY—MAINTENANCE OF—Entry on Land for purpose of**—*Lands sublet—Unreasonable withholding—Jurisdiction—Compensation to owner—Defence of the Realm Acts—Regulation 2 L.*] Lands were compulsorily acquired by the defendants for the maintenance of food supply under Regulation 2 L of the Defence of the Realm Act, which lands were at the time sublet in conacre. In an action by the owner of the lands against the defendants for damages and an injunction: *Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the question whether the use of the lands had been unreasonably withheld was one solely for the opinion of the Department of Agriculture, whose conclusion thereon was not open to review in an action. *Held*, also that the omission from the Regulation, as applied to Ireland, of sub-s. 4, providing for compensation on the determination of the occupation to any person injuriously affected by the exercise of the powers under the Regulation does not amount to a statutory rescission of any existing right of compensation vested in such person. *Rooney* v. *The Department of Agriculture* [1919, 1 I. R. 302.

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**INFANT—CUSTODY—Right of Mother of illegitimate child**—*Dead mother's wishes—Welfare of child.*] In the case of the father of a legitimate child, if he has not waived or forfeited his right by conduct, the Courts will allow his wishes to control the faith of the child, even after his death; but in the case of the mother of an illegitimate child, will only allow her wishes to control the faith of the child so long as she is living and her obligation to support the child remains. Where the special facts nullify or negative the application of any rule of law or practice compelling the Court to yield to the wishes of a parent as to the religion of a child, the Court is bound to pay regard solely to the welfare of

INFANT—*continued.*
the child. On the 6th April, 1911, *M. C.*, a woman in humble circumstances, gave birth in a workhouse to an illegitimate daughter, who was baptized in accordance with the rites of the Roman Catholic Church, of which the mother was a member. On leaving the workhouse the mother and infant came to reside, at first as lodgers, in the house of *S.* and his wife, who were members of the Church of Ireland, and who carried on the business of stationers and news-agents, S. being also a teacher of music. The mother's health shortly afterwards broke down, and from that time to the date of her death on the 5th July, 1918, she and her child were voluntarily supported by *S.* and his wife. In the month of November, 1912, *M. C.* was received into the Church of Ireland, and her infant was at the same time baptized in that faith. Until a few hours before her death, *M. C.* remained a professing adherent of the Church of Ireland, and her child was brought up in the same faith; but when on her death-bed the mother was visited by a priest of the Roman Catholic faith, who received her back into that Church, and who stated that she then expressed her earnest desire that her child should be brought up a Roman Catholic. S. and his wife were willing and anxious to adopt the child as their own. On the death of *M. C.* an application was brought by her mother *K. C.*, who was also in very humble circumstances, seeking to be appointed as guardian of the child, and that the latter should be brought up in the communion and doctrines of the Roman Catholic Church. This application was refused by the Master of the Rolls, whereupon *K. C.* appealed to the Court of Appeal, an application being then made that a certain lady of position should be appointed as guardian of the infant, and the infant be sent to an institution to be brought up as a Roman Catholic. *Held*, by the majority of the Court of Appeal (the Lord Chancellor and Ronan L.J., O'Connor L.J. dissenting), that the application should be refused, and that the infant should be allowed to remain in the care of *S.* and his wife. *In re Connor* - - - M. R. APP. 361-367

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**1. LAND REGISTRY—Annuity in lieu of right of residence—Burden**—*Right of residence on farm—54 & 55 Vict. c. 66, s. 45.*] By a marriage settlement executed in 1907 by *A*, the intended husband, *B*, the intended wife, and *C*, a brother of *A*, it was agreed that if *A* died without issue, *A's* farm of lands should become the absolute property of *B*, and *A* and *B* thereby jointly and

**LAND REGISTRY**—*continued.*
severally covenanted with *C* to support, clothe, and maintain him during his life in the residence on the farm, he continuing to work there, and that if he should leave he should receive in lieu thereof an annuity of £15 during his life. *Held*, that the rights of *C* were charges on the lands, and that the covenant was rightly entered as a burden on the folio of registration under the Local Registration of Title (Ireland) Act (54 & 55 Vict. c. 66, sect. 45). *In re Shanahan* - - APP. 131

2. **LAND REGISTRY**—Burden—*Price payable by instalments and charged on the lands—Entry on Register—Lands conveyed in fee simple—Covenant against alienation, etc.—Repugnancy—Practice—Reference to the Court by the Registrar—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66, *sect.* 14, *sub-s.* 2; *s.* 45, *sub-s.* 1 (*k*).] The Congested Districts Board purchased for cash certain lands, subject to Land Commission annuities, which the Board redeemed out of their own funds. Subsequently the Board conveyed the lands to four purchasers, the purchase-moneys with interest to be paid by instalments extending over sixty-eight and a half years. Each purchaser charged his holding with the payment of the instalments, and covenanted that he would not, so long as any of the purchase-money remained unpaid, alienate, sub-divide, or sub-let his holding or any part thereof without the Board's consent. *Held*, that the covenants referred to were not repugnant to the estates conveyed, and should be entered on the register. The rule of law which avoids restrictions inconsistent with the estates to which they are annexed, and the limitations to the rule, discussed. *In re The Congested Districts Board* [ROSS J. 146

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**LIMITATIONS, STATUTE OF—REALTY—Mortgage—Mortgagee's suit for benefit of all incumbrancers**—*Claim by puisne incumbrancer—No payment of principal or interest to claimant for more than twelve years before claim—Action commenced within twelve years of claimant's mortgage—Right of claimant to payment—R. S. C., Or.* 33, *r.* 7.] A mortgagee's suit enures for the benefit of all incumbrancers on the lands. A mortgagee, whose claim is not statute-barred at the date of the commencement of the action by the plaintiff, is entitled, on bringing in his claim, to be paid his principal with six years' arrears of interest accrued prior to the commencement of the action. *Sterndale* v. *Hankinson* (1 Sim. 393) applied: *Bennett* v. *Bernard* (12 Ir. Eq. Rep. 229) followed. The distinction, in this respect, between the effect of bringing an action for foreclosure and an action for the sale of the mortgaged lands observed upon. *Harpur* v. *Buchanan* - M.R. 1

**MORTGAGE—RECEIVER—Appropriation towards payment of arrears of interest more than six years due**—*Payment of rent and profits to the mortgagees—Right of mortgagees—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 24, *sub-s.* 8.] A receiver appointed by a mortgagee pursuant to the powers of the 24th section of the Conveyancing Act, 1881, being for all purposes the agent of the mortgagor, commits a breach of duty if he pays arrears of interest on the mortgage which are statute-barred; and if he pays over the rents and profits to the mortgagees, they cannot legally appropriate them to the payment of such arrears. "Due" in sect. 24, sub-s. 8, of the Conveyancing and Law of Property Act, 1881, means due and legally recoverable. *Hibernian Bank* v. *Yourell* (*No.* 2).
[1919, 1 I. R. 310

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**ORNAMENTAL TREES**—Compensation for taken compulsorily - - - 23
*See* TIMBER.

**PERPETUITY**—Invalid settlement confirmed by subsequent instrument—Time from which the period runs—*Annuity—Appointment of life estates contingent on survivorship—Alternative or dependent appointment—Limitation of annuity—Merger—Perpetual annuity secured by term of 1000 years—Realty or personalty—Power to redeem annuity—Perpetuity.*] A settlor, who was in fact tenant in tail of certain lands, by indenture, dated the 17th September, 1855, executed on the marriage of his eldest son *A*, purported to create a perpetual rentcharge out of the inheritance of the said lands, to be held in trust for *A* for life, with remainder in trust for the intended wife for her life, with remainder in trust for the issue of the marriage as the husband or wife should appoint, and in default of appointment for the issue of the marriage and their heirs equally; and by the same indenture the lands were demised to trustees for the term of 1000 years, upon the usual trust for securing payment of the rentcharge. The settlement also contained a provision that the person or persons for the time being beneficially entitled to, or in possession of, the reversion and inheritance of the lands should be at liberty to extinguish the said rentcharge, and discharge the lands therefrom by the payment of a capital sum to the trustees. This indenture was not enrolled as a disentailing assurance. After the death of the settlor, *A* executed an indenture, dated the 23rd April, 1868, duly enrolled as a disentailing assurance, whereby, after reciting that he was seised of the lands as tenant in tail, and that he was desirous of carrying out his father's intentions, he granted the lands to the then trustees of the indenture of 1855 for the term of a 1000 years from the 17th September, 1855, upon the trusts and with the powers in the said indenture of 1855 declared, and subject thereto to the use of himself in fee simple. There were issue of the marriage of *A* three sons and three daughters, all of whom were born before the execution of the indenture of 1868. In 1877 *A* made his will, whereby, in professed exercise of the power conferred upon him by the indenture of 1855, he appointed the said rentcharge to his two younger sons, in equal shares, during their respective lives, and upon the death of one or both of them he appointed that a portion of the whole of the said rentcharge should be divided in equal shares between such of his three daughters as should be then living, for their joint lives, and for the survivor of them during her life; and after the death of the survivor of all his younger children he appointed the rentcharge to his eldest son *B* "to the intent that the same might merge and be extinguished in the inheritance of the lands charged therewith." In 1881 *A* executed a deed poll whereby, after reciting that under the will of his

**PERPETUITY**—*continued.*

father (the settlor in the indenture of 1855) the lands out of which the rentcharge issued stood limited upon trust for himself for life, with remainder to his first and other sons as he should appoint, and in default of appointment to the use of his first son who should attain the age of twenty-one years in fee simple, he released the said lands from the said power of appointment. By an indenture of the 17th October, 1881, the lands were settled upon *A* for life with remainder to *B* (his eldest son) for life, with remainder to the first and other sons of *B* successively in tail male, with remainders over. *A* died on the 21st June, 1887, leaving his six children him surviving. *B* died in 1892 without issue. *Held*—1. That the indenture of 1868 must be read as relating back to the indenture of 1855 for the purpose of setting up the limitations contained in the earlier deed. 2. That the appointments of the rentcharge made by the will of *A* must be treated as appointments made under the indenture of 1855, and that, as it might not be ascertainable within the period allowed by the rule against perpetuities which of the daughters of *A* would survive their brothers, the appointment to them was bad: *Whitby* v. *van Luedecke*, [1906] 1 Ch. 783. *In re Thatcher's Trusts*, 26 Beav. 365, followed. 3. That the appointment of the rentcharge after the death of the survivor of *A's* younger children to *B* failed as being dependent upon a prior invalid appointment. 4. That the rentcharge was personal estate. 5. That the provision in the indenture of 1855 for the redemption of the rentcharge violated the rule against perpetuities. *Tyrrell's Estate*, [1907] 1 I. R. 292, followed. *In re Ramadge's Settlement*; *Hamilton* v. *Ramadge* - - - - - M. R. 205, 206

**PERSONAL REPRESENTATIVE**—Necessity for resealing in Ireland of English grant - - - - - - 16
*See* PRACTICE—PARTIES.

**PETTY SESSIONS CLERK—OFFICE OF—Disqualification of women**—*Inveterate usage—"Proper person"—Petty Sessions Act*, 1827 (7 & 8 *Geo.* 4, *c.* 67), *s.* 8; *Petty Sessions Act*, 1858 (21 & 22 *Vict. c.* 100), *s.* 7.] A woman by reason of her sex is disqualified from being appointed or acting as Clerk of Petty Sessions. *Frost* v. *Rex*
[BARTON J.; APP. 81, 84.

**PRACTICE—ADMINISTRATION**—*Secured creditor—Proof against personalty in Court after Order on further consideration.*] In an administration suit, there being an unallocated fund in Court, a secured creditor was allowed to prove against the general estate, subject to terms as to costs, although the time for making claims and

**PRACTICE**—*continued.*
moving to vary the chief clerk's certificate had long elapsed, and the order on further consideration had been made some years previously. *Browne* v. *Browne* - - - - - POWELL J. 251

**PRACTICE — ALLOCATION** — War Loan — Fund in Court — Income tax not deducted [358
*See* REVENUE — INCOME TAX.

**PRACTICE — COMMITTAL — ATTACHMENT**—*Requisites of affidavit for.*] An application for the issue of a writ of attachment is technically different from an application for a committal order, and the provisions of Order 52, rule 4, which require that every notice of motion for an attachment must state in general terms the grounds of the application, do not apply to a motion to commit. The distinction between attachment and committal considered. *Taylor, Plinston Brothers, & Co., Ltd.*, v. *Plinston* ([1911] 2 Ch. 605) followed. *Cooke* v. *Cooke* - - APP. 227

**PRACTICE—LAND REGISTRY**—Reference to the Court by the Registrar - 146
*See* LAND REGISTRY.

**PRACTICE—ORIGINATING SUMMONS**—*Time for appealing—R.S.C.*, 1905, *Order* 58, *rule* 15; *Order* 55, *rule* 4.] An originating summons taken out pursuant to Order 55, rule 4, is an action; and the time for appealing from an order of the Court on such a summons is not limited to twenty-one days. *Beamish* v. *The Attorney-General and others* - - - - - 430

**PRACTICE PARTIES — Administration suit**—*Legal personal representative—English personal representative resident and sued in Ireland.*] The legal personal representative of a deceased intestate is a necessary party to a suit for the administration of his personal estate, and no decree can be made in such a suit in Ireland against a party who has obtained a grant of letters of administration in England, which has not been re-sealed in Ireland, even though such party is resident in Ireland. *M'Sweeney, deceased. M'Sweeney* v. *Murphy* - - - - - - APP. 16

**PRACTICE—TRUSTEE ACT, 1893** (56 & 57 *Vict. c.* 53), *sect.* 33—*Appointment of person to convey—Order for sale of land.*] Where the Court orders a sale of land, and a person entitled, being a party to the proceedings, refuses to execute the deed, the person having carriage of the proceedings, and not the purchaser, is the proper person to take out a summons to have a person appointed to convey under sect. 33 of the Trustee Act, 1893. *Moorehead* v. *Kirkwood* - - - M. R. 225

**PRINCIPAL AND AGENT**—Agreement for sale—Letter from Agent to Principal—Evidence - - - - - 151
*See* SPECIFIC PERFORMANCE.

**PROFIT A PRENDRE—Turbary**—*Reservation—Perpetuity—Vesting Order—Superior interest.*] There cannot be a grant of a profit a prendre without a capable grantee. A series of residents in a house are not capable grantees. *Westropp* v. *Congested Districts Board* - - H. L. 224

**PROOF OF DEBT** in administration suit after further consideration - - - 251
*See* PRACTICE—ADMINISTRATION.

**RAILWAY — ABANDONMENT OF UNDERTAKING—Application of Deposit Fund**—*Compulsory powers—Persons "subjected to injury or loss in consequence thereof"—Costs of arbitration—Newry, Keady, and Tynan Light Railway Act*, 1900 (63 & 64 *Vict. c. celxxv*), *s.* 56—*Newry, Keady, and Tynan Light Railway Act*, 1909 (9 *Ed.* 7, *c. cxl*), *s.* 20—*Railways Act* (*Ireland*), 1851 (14 & 15 *Vict. c.* 70), *s.* 13.] Pursuant to certain local Acts of Parliament, a railway company was formed to make a railway. The persons through whose lands the railway was to run, by invitation of the company, appeared before the arbitrator, and employed engineers and solicitors, in respect of whose fees and costs they incurred liability, but the undertaking was ultimately abandoned. *Held*, that everything done after the appointment of the arbitrator was done in exercise of the company's compulsory powers; that the liability for the costs and fees was "injury or loss in consequence" thereof, within sects. 56 and 20 (which were in the common form) of the Newry, Keady, and Tynan Railway Acts, 1900 and 1909 respectively; and that therefore such fees and costs were a first charge upon the parliamentary deposit fund. *Uxbridge Case* (43 Ch. D. 536) held not applicable to proceedings at a similar stage in Ireland. *In re The Newry, Keady, and Tynan Railway Co.* - - - ROSS J. 268

**RESEALING** English grant of administration [16
*See* PRACTICE—PARTIES.

**RESERVATION** of turbary to residents in house - - - - - - 224
*See* PROFIT A PRENDRE.

**RESIDENCE** on farm—Annuity in lieu of right of—Burden - - - - - 131
*See* LAND REGISTRY. 1.

**RESTRAINT OF TRADE** - - 62
*See* COPYRIGHT.

**REVENUE—INCOME TAX—Fund in Court** —*Five per cent. War Loan—Deduction of income tax.*] On the allocation of a fund in Court, representing the proceeds of the sale of five per cent. War Loan, a claim was made by the Commissioners of Inland Revenue for the payment of income tax accrued in respect of the income of the fund: *Held*, that the deduction of income tax before distribution of the fund amongst the persons entitled would be a contravention of the terms upon which the five per cent. War Loan was issued, and that the proper procedure was to distribute the entire balance without deduction in respect of income tax, leaving it to the Commissioners of inland Revenue to recover the tax (if any) payable by the persons entitled to the fund. *In re M'Coy, deceased*; *Cox* v. *Murray* - M.R. 358

**RULES AND ORDERS**—R. S. C., Order 33, r. 7, - - - - - - 1
*See* LIMITATIONS, STATUTE OF—REALTY.

—— —— R. S. C., Order 52, r. 4, - 227
*See* PRACTICE — COMMITTAL — ATTACHMENT.

—— —— Order 55, r. 4 - - - 430
*See* PRACTICE—ORIGINATING SUMMONS.

—— —— Order 58, r. 15 - - - 430
*See* PRACTICE—ORIGINATING SUMMONS.

**SETTLED LAND ACT, 1882** (45 & 46 *Vict. c.* 38), *s.* 18—"**Enfranchisement**"—*Yearly tenancy—Mortgage for purpose of purchasing fee.*] "Enfranchisement" in s. 18 of the Settled Land Act, 1882, includes the purchase of the reversion in fee of settled lands held on a yearly tenancy. *In re Corcoran's Settled Estates* POWELL J. 283

**SETTLED LAND ACTS—Tenant for life**—*Will—Gift to widow during widowhood for benefit of herself and children—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 5, 7, *and* s. 58, *sub-s.* 1 (vi).] A testator gave the lands of *F* and personal property to trustees on trust after payment of debts, etc., to permit and suffer his wife *G* to manage the residue of the same, and to receive the interest, dividends, and annual produce thereof "for her life, or until she shall marry again for the benefit of herself and our children as she may think fit." A full life-interest in part of the lands was by the effect of the will and two codicils thereto secured to her on her re-marriage. *Held* (following *In re Pollock*, [1906] 1 Ch. 146), that *G* had the powers of a tenant for life as regards the lands of *F* under sect. 58, sub-s. 1 (vi), of the Settled Land Act, 1882, subject in effect to an equitable incumbrance on her interest in favour of the children. *In re Martin*; *Martin and Settled Land Act* - - - PIM J. 71

**SETTLEMENT — CONSTRUCTION — Absence of words of Limitation** — *Intention — Estate for life or in tail.*] By a marriage settlement executed in 1865, a fee-simple estate was limited to trustees from and after the solemnization of the marriage to the use of the husband for life with remainder to the use of the wife for life with remainder to the first and other sons of the marriage in tail male, with remainder, if there should be only one daughter of the marriage, to the use of such only daughter and her assigns, and if there should be more than one such daughter, "to the use of all such daughters and the heirs of their respective bodies in equal shares as tenants in common," with remainder, "if any one or more of the said daughters shall die without issue then as well as to the original share or shares of the daughter or daughters so dying as to the share or shares that shall have survived or accrued to such daughter or daughters or to the heirs of her or their body or respective bodies to the use of the others or other of the said daughters and the heirs of their or her respective bodies or body, and if more than one, in equal shares and in default of such issue," remainders over. There was issue of the marriage, one son and one daughter. The son having died without male issue, and without having disentailed: *Held*, that on the true construction of the deed, the surviving daughter was entitled to an estate tail in possession, and not a life estate only. *Giltrap and Earl* v. *Earl and Nixon* M. R. 53

**SETTLEMENT — CONSTRUCTION — Real Estate—Limitations—No words of inheritance**—*Equitable estate in fee—Estate for life or in fee simple—Intention—Vendor and purchaser summons—Procedure.*] A limitation in a deed of an equitable estate without words of limitation confers the equitable fee, where a sufficient indication is found on the face of the deed that an estate in fee simple is intended to pass. Real estate was in 1883 conveyed to trustees on trusts contained in a marriage settlement dated in 1867, namely, to hold the same upon trust for the children of the marriage (save and except the eldest son) in such manner as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default for the said children in equal shares. No joint appointment was made. By deed poll dated in 1909, the wife, the survivor, in exercise of the power given to her by the settlement, appointed the said rea estate to *W.* (one of the younger children of the

**SETTLEMENT**—*continued.*

marriage) "absolutely and to the intent that he should be forthwith entitled to call for . . . an assignment of . . . the lands and premises." *Held*, that *W.* took an equitable estate in fee, there being a sufficient indication on the face of the deed of an intention that an equitable estate in fee should pass to *W.* A vendor of the lands claiming through *W.* brought a summons under the Vendor and Purchaser Act, 1874, for a declaration that a good title had been shown in accordance with her contract with the purchaser who had declined to complete. *Held*, that a good title had been shown, and that the procedure by summons under the Vendor and Purchaser Act was the appropriate remedy. *In re Murphy and Griffin's Contract*

[POWELL J. 187

**SETTLEMENT—GRAFT**—*Lease for lives—Sub-demise by owner of the lease upon the trusts of the settlement—Fixing of fair rent by tenant for life under the settlement—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *sect.* 11—*Land Law (Ireland) Act*, 1887 (50 & 51 *Vict. c.* 33), *sect.* 1.] Under a lease dated the 1st day of May, 1841, lands were held for lives and a concurrent term of thirty-one years with a covenant against sub-letting without the consent in writing of the lessor. A portion of the lands was by indenture dated 1st day of May, 1853, sub-demised to *S.* for the lives in the head lease, and for the residue of the term of years less one day. The term of years expired in 1872. By indenture of marriage settlement, dated the 13th day of October, 1874, the lands comprised in the sub-demise were demised by *S.* to trustees for 100 years if cestuis que vie in the original lease should so long live. The settlement contained express covenants for right to convey quiet enjoyment and further assurance. Neither lessor nor sub-lessor consented to this sub-demise. There were four children of the marriage. The settlor, who was tenant for life, applied to the Land Commission to have a fair rent fixed. He died intestate after the hearing and before any order was made. After his death an order fixing a fair rent was made in his name. On his death his widow *M.* took out letters of administration to his personal estate, and became tenant for life under the settlement, and went into possession. The lands were subsequently purchased by *M.* under the Irish Land Purchase Acts, and the fee-simple therein was vested in her by order of the Land Commission, subject to equities. *Held*, that the estate so acquired was a graft upon the previous interest of the tenant under the settlement which enured for the benefit of the settlement. *Barrett* v. *Hanbury* - M. R. 275

**SETTLEMENT**—Invalid, confirmed by subsequent settlement—Appointment under—Rule against perpetuities—Time from which period calculated - - 205
*See* PERPETUITY.

**SOLICITOR—BILL OF COSTS—Taxation**—"*Extraordinary Case*"—*Discretion of Taxing master—Solicitors' Remuneration Act*, 1881—*Schedule II, General Orders*, 1884.] The taxing master refused to allow *A.*, a solicitor, certain items in a bill of costs incurred in relation to the preparation of two mortgages executed by *M.* on the ground that it was "an extraordinary case" coming within Schedule II, General Orders, 1884, made under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), and that he was entitled to use his discretion in diminishing the bill. *Held*, that the taxing master in "an extraordinary case" has power to diminish or increase any charges prescribed in the schedule. *In re Martin*; *Ex parte Alexander* - - - M. R. 51

**SPECIFIC PERFORMANCE — Offer—Acceptance**—*New term—Paincipal and agent—Statement by agent to principal—Evidence—Statute of Frauds, s.* 4.] The defendants, who held premises in Belfast under a lease for 999 years at a yearly rent of £35, constituted *H.* their agent to sell the premises, and they arranged with him that the sale should be carried out by granting to the purchaser for the sum of £4750 a new sub-lease of the premises subject to an annual ground rent of £50. *H.* thereupon communicated to *C.*, an authorized agent of the plaintiff, the defendants' willingness to sell the premises for £4750 subject to an annual ground rent of £50, but *C.* and his principal, the plaintiff, were left under the impression that this £50 rent was the rent payable by the defendants under a subsisting lease, and were unaware that the subject-matter of the sale was a new sub-lease to be created subject to that rent. Subsequently *C.*, on the 17th November, 1917, sent a telegram to *H*, offering, on behalf of his principal, £4750 for the premises, but making no reference to the £50 rent. *H.*, on the 19th November, having in the meantime communicated with the defendants, wrote to *C.* stating that the defendants had wired him accepting the offer of £4750, "plus £50 annual ground rent." On the 20th November *H.* wrote to the defendants stating that the plaintiff had called on him that day "to say he had bought the premises at £4750 plus £50 ground rent," etc. On the same day the plaintiff forwarded for signature by the defendants a formal proposal for the purchase of the premises "held for a term of 999 years at the yearly ground rent of £50 for the price or sum of £4750," but the

**SPECIFIC PERFORMANCE**—*continued.*
defendants by letter to *H.* on the 22nd November definitely declined the offer, and refused to proceed further with the sale. In a suit for specific performance by the plaintiff, *held* by Ross J. that, on the correspondent, taken as a whole, there was a binding agreement for the sale of the premises, and that the requirements of the Statute of Frauds had been complied with. *Held*, by the Court of Appeal (Ronan and O'Connor L.JJ., Sir J. Campbell C. diss.), that the plaintiff was not entitled to a decree for specific performance; that the letter of the 19th November from *H.* to *C.* was not an unconditional acceptance of the offer contained in the telegram of the 17th November from *C.* to *H.*, by reason of the inclusion of a new term, namely, the payment of £50 ground rent; and that, if the said letter of the 19th November could be treated as constituting a new offer, capable, if accepted by parol, of being enforced against the defendants as being the parties to be charged, the letter of the 20th November from *H.* to the defendants (if admissible in evidence at all) afforded no evidence against them of a parol acceptance by the plaintiff of such new offer, *The Solway* (10 P. D. 137) dissented from. *Swan* v. *Miller, Son, and Torrance, Ltd.* - - - - Ross J. 151

**STATUTES**—7 Will. 3, c. 12 (Ir.), s. 4 (Statute of Frauds) - - - - 151
*See* SPECIFIC PERFORMANCE.

—— 7 & 8 Geo. 4, c. 67 (Petty Sessions Act, 1827) - - - - - - 81
*See* PETTY SESSIONS CLERK.

—— 3 & 4 Will. 4, c. 27, s. 1 (Limitations) 116
*See* WILL—ESTATE IN REALTY.

—— 21 & 22 Vict. c. 100 (Petty Sessions Act, 1858) - - - - - - - 81
*See* PETTY SESSIONS CLERK.

—— 37 & 38 Vict. c. 57 (Limitations) - 116
*See* WILL—ESTATE IN REALTY.

—— 44 & 45 Vict. c. 41, s. 24, sub-s. 8 - 310
*See* MORTGAGE—RECEIVER.

—— 44 & 45 Vict. c. 44, Sch. II - - 51
*See* SOLICITOR—BILL OF COSTS.

—— 45 & 46 Vict. c. 38, ss. 2 and 58 - 71
*See* SETTLED LAND ACTS.

—— 45 & 46 Vict. c. 38, s. 18 - - 283
*See* SETTLED LAND ACT, 1882.

—— 50 & 51 Vict. c. 33, s. 1 - - 275
*See* SETTLEMENT—GRAFT.

—— 54 & 55 Vict. c. 66, ss. 14, 45 - - 146
*See* LAND REGISTRY. 2.

**STATUTES** -*continued.*

—— 54 & 55 Vict. c. 66, s. 45—Local registration of title - - - - - - 131
*See* LAND REGISTRY 1.

—— 56 & 57 Vict. c. 53, s. 33 - - 225
*See* PRACTICE—TRUSTEE ACT, 1893.

—— 59 & 60 Vict. c. 47, s. 11 - - 275
*See* SETTLEMENT—GRAFT.

—— 1 & 2 Geo. 5, c. 46—Copyright - 62
*See* COPYRIGHT.

**TENANT FOR LIFE**—Gift to widow during widowhood for benefit of herself and children - - - - - - 71
*See* SETTLED LAND ACTS.

**TIMBER—Ornamental trees felled and taken compulsorily for military purposes**—*Settled Lands—Tenant for life unimpeachable for waste—Compensation invested upon trusts of settlement—Equitable waste.*] The Home-grown Timber Committee, acting under the powers conferred by the Defence of the Realm (Consolidation) Regulations, 1914, as amended by an Order in Council of April 12th, 1916, entered upon settled lands the tenant for life of which was unimpeachable for waste; felled and took away, for military purposes, ornamental trees growing in the demesne, and paid to the trustees £630 by way of compensation. The tenant for life in possession claimed to be entitled to the money absolutely. The trustees and the tenants in remainder claimed that it should be treated as capital money, and invested and held upon the trusts of the settlement. *Held*, by the Master of the Rolls, that at the moment of severance the legal property in the trees passed to the Crown; and that the trustees were bound to invest the compensation money, and to hold the investment to the uses and upon the trusts of the settlement. *Held*, by the Court of Appeal (affirming the decision of O'Connor M.R.), that the money given by way of compensation was paid for damage to the inheritance, and that it must be applied by the trustees as part of the corpus of the estate. *Held* also, that the principle of the decisions by which windfalls or trees felled by trespassers become the property of the tenant for life, unimpeachable for waste, is not applicable where trees are severed, carried away, and appropriated by the act of an overriding authority. Per Ronan L.J.: Ornamental trees severed by accident or the wind, or by the wrongful act of a stranger, do not become the property of a tenant for life without impeachment of waste; and in respect of these he is, in equity, treated as if he were impeachable for waste. Per O'Connor L.J.: Trees

**TIMBER**—*continued.*
thus severed become the property of the tenant for life, without impeachment of waste; because (*a*) there is no unconscionable conduct on his part, and the prohibition which equity enforces against the doing of anything that impairs the amenity of the inheritance can have no application to that which, in the ordinary course of nature, ceases to be a subject of ornament or amenity; (*b*) the trees had become a chattel by an act over which the unimpeachable tenant had no control, and he had done nothing to disentitle himself to the property in them. The remedy of a remainderman in such a case is an action against the wrongdoer. *Pigott, deceased*; *Gage and Roper, plaintiffs*; *Pigott and de Jenner, defendants* - - M.R. App. 23

**TITLE**—Depending on doubtful question of construction — Originating summons 422
*See* Vendor and Purchaser—Title.

**TURBARY**—Reservation to residents in house [224
*See* Profit à Prendre.

**UNREASONABLE WITHHOLDING OF LAND** - - - - - - 362
*See* Food Supply, Maintenance of.

**VENDOR AND PURCHASER SUMMONS** - - - - - - 187
*See* Settlement—Construction.

**VENDOR AND PURCHASER — TITLE** — *Forcing doubtful title—Difficult question of construction—Procedure—Vendor and purchaser summons—Originating summons—Costs.*] Where a vendor's title to land depends upon a question of construction involving real difficulty, that question ought to be decided on an originating summons, and not on a vendor and purchaser summons. A vendor of lands made title under the residuary clause in a codicil which ratified and confirmed a will. The purchaser objected to the title, alleging that the property passed under the residuary clause in the will. *Held*, applying *In re Nichol's and Von Joel's Contract*, [1910] 1 Ch. 43, that the question ought to be decided upon an originating summons so as to bind everybody, that the present summons should stand adjourned so as to allow the vendor to take out such a summons, and that the purchaser should have the costs of the present summons. *In re Hogan and Marnell's Contract* [Powell J. 422

**WAR LOAN**—Income tax not deducted on allocation—Fund in Court - 358
*See* Revenue—Income Tax.

**WASTE** - - - - - - - - 23
*See* Timber.

**WILL — ESTATE IN REALTY — Devise to heirs in priority of birth**—*Gift over on death without issue—Estate in fee.*] A testator made a bequest of his lands to his child *M. L. B.* as follows:—"My estates . . . I leave to the child . . . and to the heirs of said child, the male taking before the female according to priority of birth and seniority of age, and to their heirs for ever . . . Now, in case the said child should not live or in the event of its death without issue, I leave the whole of my property . . . between my cousins . . ." *Held*, that *M. L. B.* took an estate in fee simple in the lands, with an executory limitation over to the testator's cousins. *In re Bonynge, deceased*; *Finucane* v. *Daly* [Powell J. 284

**WILL — ESTATE IN REALTY — Estate tail — Limitation of — Name and Arms Clause** — *Condition — Condition precedent or subsequent — Statute of Limitations — Action for the Recovery of land.*] Real estate was limited by a will to *E. N.* and her heirs male, "she and they and her husband taking the name and bearing the arms of *N.*" *Held*, that these words formed no portion of the limitation of the estate tail, but imported at most a condition subsequent. Also *held*, that an action instituted by a descendant of *E. N.* (whose immediate predecessor had barred the entail in the lands), claiming a declaration of title, subject to the rights of the defendants who were occupying tenants, was an action for the recovery of land within 3 & 4 Wm. 4, c. 27, s. 1, as amended by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). *Vandeleur* v. *Sloane* [M.R. 116; App. 123

**WILL—ESTATE IN REALTY — Limitation executed or executory**—*Direction that land "be entailed and go to next heir"—Estate tail or estate for life.*] A testator left all his landed property, which included *W.*, subject to certain reservations, to his eldest son, and directed "the lands of *W.* to be entailed and go to next heir, and not to be sold or otherwise disposed of." *Held*, that the trust was executory and that the lands were subject to the limitations of a strict settlement, under which the devisee took an estate for life, and not an estate in tail. *Blackburn* v. *Stables* (2 V. & B. 367) not followed.] *Butler, deceased*; *Delap* v. *Butler* - - L. C. 74

**WILL—SPECIFIC LEGACY — Interest**—*Trust for payment of legacy at a future time—Date from which interest runs.*] A testatrix entitled to receive a sum of £2000, bearing interest at £6 5*s.*

**WILL**—*continued.*
per cent., bequeathed the said sum of £2000 to a trustee, to be held by him when received in trust for certain legatees, and the residue of her property to residuary legatees. The interest was paid to the testatrix down to the time of her death. The capital sum of £2000 was subsequently paid to the legatees entitled thereto. *Held*, that the interest accruing subsequent to testatrix's death should be paid to the legatees of the sum of £2000, and not to the residuary legatees. *In re Jacob, deceased*; *M'Coy* v. *Jacob* - POWELL J. 134

**WILL— UNCERTAINTY**—Charitable bequest—*Bequest to the Pope "to use in the carrying out of the sacred office."*] Bequest of £10,000 to "His Holiness . . . the Pope . . . to use and apply at his sole and absolute discretion in the carrying out of the sacred office." *Held*, void, as being applicable to purposes not strictly charitable and possibly illegal. *In re Moore, deceased*: *Moore* v. *His Holiness Pope Benedict XV* [POWELL J. 316

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